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No. 454

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

JAMES D. NOLAN,

Appellant,

vs.

JAMES A. RHODES, GOVERNOR OF OHIO,
ROGER W. TRACY, AUDITOR OF OHIO,
TED W. BROWN, SECRETARY OF STATE OF OHIO,

Appellees.

JURISDICTIONAL STATEMENT

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Appellees.

JURISDICTIONAL STATEMENT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

JURISDICTIONAL STATEMENT

OPINION BELOW

Appellant appeals from a judgment of a three-judge United States District Court for the Southern District of Ohio entered on June 12, 1963, dismissing Plaintiff's complaint, which had requested injunctive and declaratory relief for a claimed violation of the rights of the Appellant and other citizens and voters of Ohio similarly situated by virtue of an unconstitutional dilution of voting rights in electing members of the Ohio House of Representatives.

The Opinion of the three-judge court has not yet been officially reported and is set forth in Appendix A hereof.

JURISDICTION

On June 12, 1963, the Three-Judge District Court entered an order dismissing Appellant's complaint. On July 11, 1963, a notice of appeal to this court was filed in the district court. Jurisdiction of this court to review on direct appeal the decision dismissing the complaint is conferred by 28 U.S.C. 1253 and is sustained by the cases of *Baker v. Carr*, 369 U.S. 186; *WMCA v. Simon*, 370 U.S. 190, and the noting of probable jurisdiction by this court during the October 1962 Term of Court in *WMCA v. Simon* No. 460 (Ruling below D. N.Y. 31 L.W. 2121); *Reynolds v. Sims* No. 508 (Ruling below D. Ala. 7/21/62); *Vann v. Frink* No. 540 (Ruling below D. Ala. 7/21/62); *Maryland Committee on Fair Representation v. Tawes* No. 554 (Ruling below Md. Ct. App., 41 L.W. 2155); *McConnell v. Frink* No. 610 (Ruling below D. Ala. 7/25/62); and *Davis v. Mann* No. 797 (Ruling below D. Va., 31 L.W. 2263).

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment is violated by Article XI of the Ohio Constitution, as amended in 1903, providing for State Legislative apportionment which for Ohio's lower house limits representation of the residents of populous counties, while giving the residents of each of the State's eighty-eight counties one representative regardless of its population, thus producing disparities in ratio of representation, both horizontal and vertical, as between the various counties in every degree from 2 to 1 to 14.5 to 1, and which produces malapportionment to the extent that only 28.4% of the state's population is represented by a majority in that house.

2. Whether under the Fourteenth Amendment votes of residents of sparsely populated areas may be weighted in their favor for representation in the lower house as set

forth in question one, when votes of residents of sparsely populated areas are also weighted in their favor in the upper house.

3. Whether judicial relief is precluded where there is gross disparity of voting rights as set forth above, if the State Constitution contains provisions for political action by convention and by initiative, even though:

(a) Attempts to put the issue of State Legislative Reapportionment on the ballot have, historically, failed;

(b) Political relief can be thwarted by residents of the over-represented areas of the state who benefit from the unequal legislative apportionment; and

(c) The stipulated evidence shows that the expense of the initiative procedure is prohibitive to an individual plaintiff.

4. Whether, in any event, the Constitutional right of fair representation in a state legislature can be made to depend upon the existence or nonexistence of a theoretical political remedy.

5. Whether state legislative apportionment which the trial court found is designed to give representation to counties rather than people violates the Fourteenth Amendment when it produces gross disparities of voting strength and dilutes the vote of residents of populous counties as set forth above.

CONSTITUTIONS AND STATUTES INVOLVED

The questions presented involve section 1 of the Fourteenth Amendment to the Constitution of the United States, Article XI of the Constitution of the State of Ohio, and 28 U.S.C.A. 1343. Article XI of the Ohio Constitution is set forth as Appendix B.

STATEMENT

This action was brought under the Civil Rights Act, 28 U.S.C.A. 1343, against the Governor, Auditor, and Secretary of the State of Ohio, who are charged under Article XI of the Ohio Constitution with administering the reapportionment formula set forth in Article XI of the Constitution of 1851, the basic law of Ohio.

No claim is made that the Appellees have failed to perform their duties in accordance with law. Their function, in any case, is purely ministerial and consists solely in applying the formula for reapportionment after each decennial census to determine the representation in the Ohio General Assembly for the ensuing ten year period.

The relief sought by the Appellant, for himself and on behalf of all others similarly situated, was a declaration of invalidity of a proviso in *Article XI, Section 2*, of the Ohio Constitution, causing disparity of voting rights to such an extent as to amount to invidious discrimination. Appellant also prayed for an order enjoining Appellees to perform their apportionment function without regard to the proviso.

The proviso reads as follows:

> "Provided however that each county shall have one representative."

It is only these nine words which the Appellant claims deprive him of his constitutional rights. This proviso, adopted in 1903, when the population was fairly evenly distributed throughout each of Ohio's eighty-eight counties has by the growth and shift of Ohio's population distorted the fair apportionment formula of the 1851 Ohio Constitution to the extent that 28.4% of Ohio's population are represented in Ohio's House of Representatives by a majority of the members, and has produced gross disparities in representation from county to county when tested against

any statistical measurement yet devised for evaluating fair representation.

This proviso is commonly referred to in Ohio as the "Hanna Amendment",[1] a living memorial to Mark Hanna, Ohio political leader, industrialist, and United States Senator, who, at the time of the adoption of the proviso, dominated his party in the state, "as no man has done before, or since his day."[2] For convenience, the proviso will hereinafter be referred to as the "Hanna Amendment", the name given to it by popular opinion in Ohio.

In order to state Appellant's claim, it is necessary to examine the history of legislative apportionment in Ohio and then to examine the present malapportionment.

History of Legislative Apportionment in Ohio

The history of apportionment in Ohio must begin with Article II of the Articles of Compact of the *Ordinance of the Northwest Territory of 1787* under which the territory, part of which became the State of Ohio in 1802, was governed. Article II provided, among other things, that "the inhabitants of the said territory shall always be entitled to the benefits . . . of a proportionate representation of the people in the legislature . . ."

Section 9 of the Ordinance provided the formula for representation, based solely on population, and Article V of the Compact provided that in any state formed from the

[1] See, for example, the Cleveland Press, April 8, 1929, Page 2; February 28, 1940, Page 2; April 6, 1961, Page 1; The Cleveland Plain Dealer, April 2, 1961, Page 4B; July 11, 1962, Page 8; The Akron Beacon Journal, March 26, 1963, Page 6; The Toledo Blade, March 31, 1963, Page 3; Waltzer, The Politics of Reapportionment, Page 177 (N. Y. Atherton Press, 1962); Flinn, The Outline of Ohio Politics, Western Political Quarterly, Vol. XIII No. 3, September 1960, Page 71; Compendium of Reapportionment and Subdistricting Data, Page 2 (Governmental Research Institute, Cleveland, Ohio, January, 1963).

[2] Roseboom & Weisenberger, History of Ohio, Pages 375-6 (Prentice-Hall, 1934).

territory and admitted to the Union, the Constitution and government thereof should "... be Republican, and in conformity to the principles contained in these articles ..."

Those principles were in fact adopted into the *Constitution of Ohio of 1802* and Section 2 and Section 6 provided for apportionment of representatives and senators respectively, *solely on the basis of population.*

Apportionment of both houses of the Ohio General Assembly was, in accordance with these provisions, based solely on population. This fundamental principle of representation based on population was carried forward into the *Ohio Constitution of 1851*, the basic law of Ohio today. The 1851 Constitution removed the apportionment function from the legislature and established a permanent self-executing system of apportionment based on a precise mathematical formula.

Under this formula, a so-called ratio of representation was to be determined by dividing the entire population of the state in 1851, and every ten years thereafter, by 100 in the case of the House and by 35 in the case of the Senate. *Representation in each body was to be determined solely on the basis of population, except that a concession was made to the less populous areas of the state* by providing that any county or district whose population exceeded one-half the ratio of representation in the case of the House and three-fourths the ratio in the case of the Senate was to be entitled to separate representation. In the case of both the House and the Senate, counties and districts whose populations were less than the required percentage were to be joined to the least populous adjoining counties or districts for representation (Article XI, Constitution of Ohio, 1851). From 1851 to 1903 under this provision counties were so joined for purposes of representation in the House in each decennial apportionment during that period. The applica-

tion of the formula was to be performed by the governor, the auditor and the secretary of state following each decennial census (Article XI).

On November 3, 1903, Article XI, Section 2, was amended by the addition of the Hanna Amendment providing that each county shall have one representative. No other change was made in Article XI at that time, and accordingly Sections 4 and 5 of Article XI, providing for the attachment of counties whose population fell below one-half the ratio and the reinstatement to separate representation if in any subsequent period a county should acquire sufficient population became meaningless insofar as the House was concerned, but remained in the Ohio Constitution for the purpose of attachment and separation of Senate districts.

On November 3, 1903, only ten of Ohio's eighty-eight counties had populations smaller than one-half of the ratio of representation for the House based on the Federal Census figures of 1900. Each succeeding decennial apportionment, based on each succeeding Federal Census, has shown an ever increasing shift of population from rural areas to urban areas, so that the number of counties with less than one-half the ratio of representation increased as follows:

1911—21	1941—46
1921—42	1951—47
1931—46	1961—48

The Present Malapportionment

The 1961 apportionment determined representation for the current decennial period consisting of the 105th General Assembly commencing in 1963, the 106th in 1965, the 107th in 1967, the 108th in 1969 and the 109th in 1971.

Cuyahoga County, with its population of 1,647,895, had 17 representatives in the 105th, or one representative for every 98,089 of its population. At the same time, Noble

and Vinton Counties, the smallest counties in the state with populations of 10,982 and 10,274, respectively, will each have one representative in each session of the Assembly in the current decennium. Thus, it can be said that the vote of a resident of either of these counties for its member in the Ohio House is worth almost ten times as much as the vote of the Appellant and all other Cuyahoga County voters for their representatives in the House.

Even more glaring disparities are present. For example, the ratio between Vinton County and Lake County (population 148,700) with its one representative in the 105th Assembly was almost 15 to 1. Similarly, the counties of Summit, Clark, Montgomery, Franklin, Hamilton, Stark, Mahoning, Lucas, and Trumbull all show ratios of approximately 10 to 1 when the weight of their votes for representation in the House is measured against the weight of the vote in the state's smallest counties.

The 48 counties in Ohio with populations less than one-half the 1960 House ratio of representation of 48,532 (that is, the 48 counties which, were it not for the Hanna Amendment, would be attached to adjoining counties for representation purposes), have, according to the 1960 Federal Census, only 14.2 per cent of the total population of Ohio, but were represented in the 105th House by 37.4 per cent of the membership. Counties containing less than 30% of the population were represented in the 105th House by more than 50% of the membership.

The trial court, in its Opinion (Appendix A, page 32, *infra*), lists the populations of the twenty largest counties, together with their representation, and purports to show by this tabulation that ". . . twenty urban counties have not been overlooked in their representation in the House of Representatives."

It is difficult to tell exactly what comfort the trial court derives from this tabulation. What it shows, aside from some *arbitrary designation* of some counties as urban (the last five, for example, have populations less than the ratio of representation), is that the 20 counties listed have a total population, as of the 1960 Census, of 6,792,406 of the total state population of 9,706,397. Thus 70% of Ohio's population is represented by only 50% of the membership of the Ohio House. A glance at 20 of the smaller of the other 68 counties of Ohio, each with one representative by virtue solely of the Hanna Amendment, will serve to illustrate the gross dispartities existing in representation in Ohio.

County	*Population*
Vinton	10,274
Noble	19,982
Morgan	12,747
Harrison	17,995
Monroe	15,268
Paulding	16,729
Morrow	19,405
Pike	19,380
Wyandot	21,648
Union	22,853
Meigs	22,159
Carroll	20,857
Adams	19,982
Brown	25,178
Gallia	26,120
Fayette	24,775
Henry	25,392
Hocking	20,168
Holmes	21,591
Perry	27,864
Total Population	400,430
Total Representation	20

These twenty counties with only 4% of the state's population were represented by 14½% of the House members in the 105th General Assembly. By comparing this tabulation with the twenty counties tabulated in the court's Opinion, the grossness of the voting disparities becomes apparent.

The counties of Summit, Lucas and Montgomery each have populations greater than the total population of the twenty smallest counties. Yet, those twenty have four times the representation.

Cuyahoga County, with a population more than four times that of the twenty, has fewer representatives. Endless comparisons could be made showing violent disparities from county to county throughout the state. And it is important to note that the *over-represented counties* are not *concentrated in one geographical area, but are scattered throughout every section of the state, and have no distinguishing geographical, social or economic features.* In fact, contrary to the court's assertion that Ohio's apportionment "takes into account the varying interests of its citizens engaged in different occupations in the 88 counties of the state" (Opinion, Appendix A, page 33, *infra*), the stipulated evidence shows that Ohio primarily is an industrial state throughout every section of the state, and the predominant occupation is manufacturing, even in the state's smallest counties.

Nor is the domination of the House by rural areas balanced by majority rule in the upper house of the Ohio General Assembly, since districts representing less than 50% of Ohio's population were represented in the 105th General Assembly by more than 50% of the Senate.

The gross inequality of representation in the House leads to further inequality of representation in Ohio's federal congressional districts, with representatives from rural

areas representing, generally, districts with far less number of inhabitants than the national average and with urban area congressmen generally representing far greater numbers than the national average. In terms of population, Ohio contains the fourth and tenth largest congressional districts in the country, as well as the eleventh smallest. Thus, the 3rd District has 726,156, as against 236,288 in the 15th District. All the statistical data upon which these computations were based was before the trial court and briefs and arguments on the merits will demonstrate that there is arbitrary, capricious, and invidious discrimination in voting strength throughout the state.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

It is surely superfluous to state that the question of state legislative apportionment is one of the most crucial domestic problems facing this country today. Almost one year ago, the Solicitor General of the United States characterized the issue as follows:

> "It is hardly necessary to argue the importance and divisiveness of this issue. The character of the legislative apportionment determines the basic nature of our government." (Cox, *The Nature of Supreme Court Litigation*, Address before the Federal Bar Association, Washington D. C., Sept. 8, 1962, Reprinted in Federal Bar News of Oct. 9, 1962, Vol. 9, No. 10)

It is submitted that this appeal raises fundamental questions not yet decided by this Court and not likely to be decided in any of the cases now pending before it. The nature of these questions can perhaps best be examined by considering the manner in which they were decided, or left undecided, by the trial court. Generally, the court by its opinion seemed to rely most strongly on some rough analogy to the federal system of representation:

> "What is rational for the federal government ought not to be condemned as irrational and invidious for Ohio." (Opinion, page 31, *infra*);

and on the availability of a theoretical political remedy in Ohio for unconstitutional state action:

> "Plaintiff's remedy is at the polls and not in the courts." (Opinion, page 35, *infra*)

The following comments from the opinion of the trial court indicate that this decision represents a giant step backward from *Baker v. Carr* and will serve to illustrate the substantiality of the questions presented by this appeal.

1. **(Opinion, page 27, infra) "Ohio has a bicameral legislature following the federal pattern and consisting of a Senate and House of Representatives. . . . In substance, the Senate is apportioned by population and the House by area and population."**

The so-called federal analogy has been completely refuted elsewhere.[3] But even if, for the sake of argument, we assume that a "little federal system" may justify some dilution of voting strength for some voters within a state, can a state immunize its malapportionment from judicial attack by arbitrarily weighting votes to an unlimited extent under the guise of something it compares to the federal system? This would indeed be to pretend that *Baker v. Carr* never existed, and would place the constitutional

[3] This court, for example, in *Gray v. Sanders*, 372 U. S. 368, rejected the analogy of the federal electoral college to Georgia's county unit system, stating that the former was "the result of specific historical concerns," which "implied nothing about the use of an analogous system by a state . . ." Likewise, the great compromise leading to the structure of the national legislature was a result of specific historical concerns implying nothing about the use of analogous systems by a state whose counties or other governmental units can be in no manner compared to the original thirteen sovereign states.

See also *Mann v. Davis*, 213 F. Supp. 577 (D. Va. 1962).

right of fair representation at the mercy of the ingenuity of state politicians.

Furthermore, representation in Ohio's legislature with voting strength varying from county to county cannot fairly be compared to anything in our federal system. Indeed, the only real similarity is that each has two houses.

Finally, the court has completely misunderstood the basis of representation in Ohio which has always been intended to be population only, and not population *and* area, or population *and* any other factor. Article XI of the Ohio Constitution, which today has the same formula as when adopted in 1851, except for the addition of the Hanna Amendment in 1903, was construed, shortly after its adoption, by the Ohio Supreme Court. Judge Ranney, who was a member of the Constitutional Convention which drafted Article XI, wrote the opinion for the court and stated:

> "[T]he Constitution apportions political power amongst the *inhabitants* of the state, as nearly equally as possible in proportion to numbers, without regard whatever to property, or indeed, to any other circumstance. Inhabitants alone are represented, a given number in one place exercise the same political power, as a like number in any other locality. I am aware that some departure from the absolute equality of numbers is allowed in favor of the inhabitants of small counties in the constitution of the House of Representatives; but this in no wise changes the *basis* of representation from population to territory or property."
>
> "...
>
> "To construct a scheme of constitutional apportionments, to endure for many years, and so far as the election of members of the General Assembly is concerned, subject to no control or alteration of that body, is a work of much difficulty, when it is considered how constantly and materially changes are being wrought in the political divisions of the state, and in the relative increase of population . . .
>
> (Emphasis in original.) *State ex rel. Evans v. Dudley*, 1 O.S. 437 (1853) at 442-43.

Here is an eloquent statement of the historic policy of Ohio in regard to legislative apportionment as it existed in the Ohio territory under the Northwest Ordinance, as it existed under the Constitution of 1802, and as it was meant to exist today. No change in that policy could have been intended by the people of Ohio by their adoption of the Hanna Amendment at a time when the population was more or less evenly distributed throughout the state's eighty-eight counties.

2. (Opinion, page 35, infra) "It was not irrational to allow one representative for each county."

Obviously, what was rational in 1903 is not necessarily rational today. Running throughout the court's opinion is a persistent failure to recognize that it had before it a problem peculiar to a modern, urban, industrial society which could not be solved by resort to the conditions existing in 1903. Furthermore, the court's notions of rationality appear to stem from the statement in *McGowan v. Maryland*, 366 U.S. 420, at 426, that a classification "will not be set aside if any state of facts may reasonably be conceived to justify it." (Opinion, page 34, infra) This statement will surely be relied on by opponents of reapportionment throughout the country, and it is submitted that the proposition is much too general to be of any value as a guide to legislative apportionment. Some further delineation of the limits of rationality in devising apportionment systems is required of this court.

Was not Solicitor General Cox much closer to the mark when he said:

> "In *Baker v. Carr* we also argued that the starting point in determining the constitutionality of any apportionment should be per capita equality of representatives and that any serious departure from this standard is invalid unless shown to have a rational justification. Only time can tell whether the Court will

> sustain the proposition or what it will hold to be a rational justification. To a considerable extent the Court will have to write upon a clean slate, but some guidance in the process of adjudication can be found in the history of our state and local governments and in the notions of fairness and rationality written into state constitutions *at a time when the delegates were more concerned with planning fairly for the future and less attentive to preserving their existing political power.*" (Emphasis supplied.) (Reprinted in Federal Bar News, October 9, 1962, Vol. 9, No. 10, page 249.)

The trial court has ignored the notions of fairness and rationality written into the Ohio Constitution of 1851 as explained by Judge Ranney in 1853 in *Dudley v. Evans*, page 13, *supra*.

Article XI of the Ohio Constitution, as it existed prior to the Hanna Amendment, was a well considered, carefully deliberated apportionment system with a built-in mechanism to provide for population growth and shift without creating gross disparities in voting strength.

The framers of the Constitution of 1851 removed all doubt as to their intention to provide a permanent, rational system of apportionment by providing in Section 10 of Article XI:

> "... and no change shall ever be made in the principles of representation, as herein established ..."

Should not the notions of fairness and rationality written into Article XI by its framers be compared, as Solicitor General Cox suggests, to the complete lack of those notions motivating the framers of the Hanna Amendment, whose only concern was the preservation of their existing political power? The Hanna Amendment was nothing more than an historical accident and an historical fact does not make an historical policy, as the trial court seems to believe.

3. (Opinion, page 28, infra) "The Constitution does not limit the number of representatives a county may gain by increase of its population in relation to the state's population."

This is a dangerous oversimplification capable of producing unjustified inferences about the fairness of Ohio's system of apportionment as well as the systems in the many other states having variations of the one representative per county principle.

As pointed out by Professor Robert B. McKay in *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 Michigan Law Review 698-699 (No. 4, February 1963), the one vote per county formula must necessarily submerge population as a representation principle where, as in Ohio, the number of counties to be represented approaches the number of legislators to to be elected, and where the population spread is great between the smaller and larger counties. In such a situation, population cannot be adequately represented short of a legislative body of several hundred members, and with a body of only 137 members as was Ohio's House in the 105th General Assembly, voting disparities must necessarily be extreme. It is, of course, disparity in representation and not the total number of representatives in a given county which determines whether or not the representation is fair.

4. (Opinion, page 28, infra) "The apportionment of the Ohio Senate is based as nearly as practicable upon population."

This is another oversimplification by the trial court, and ignores the plain provisions of Section 9, Article XI, which *weights votes* for Ohio's Senate in favor of the inhabitants of the more sparsely populated areas by requir-

ing only a three-fourths ratio for a senator, while larger counties are required to have full multiples of the ratio.

Even if *MacDougall v. Green*, 335 U.S. 281, is to serve as a guideline in legislative apportionment cases(though, of course, *MacDougall* did not involve state legislative apportionment), and some principle of vote-weighting is to be sanctioned, the question of the extent to which votes may be weighted in one house when votes are also weighted in the other house is one which must be answered and one which the trial court avoided.

5. (Opinion, page 29, infra) "It should be pointed out that Ohio's apportionment was not adopted by the state legislature, but by the people of the state in their Constitution. The Amendment to the Constitution under attack here was adopted in 1903 by an overwhelming majority of the electors of the state, i.e. 98% for and 2% against, and has been in effect for nearly sixty years."

The trial court here seems to be suggesting that state action in the form of a constitutional provision enjoys some sort of immunity against attack on federal constitutional grounds. Prior decisions of this court have established that such a contention is without merit. *Pierce v. Society of Sisters*, 268 U.S. 510; *Cooper v. Aaron*, 358 U.S. 1.

Even if the constitutional right of fair representation could be made to depend on the will of the majority, a proposition equally without merit, the trial court's suggestion that the Hanna Amendment represents now, or represented at any time, the will of the majority of the people of Ohio cannot bear scrutiny. First of all, Article XI and the Hanna Amendment cannot be so casually lumped together. Article XI, as has been shown, was the product of a constitutional convention which deliberately set out to produce a fair, permanent system of apportion-

ment. The Hanna Amendment, on the other hand (after being initiated by the Ohio legislature), was presented to the voters of Ohio at a regular general election, together with several other proposed constitutional amendments on other subjects of much more immediate concern to the people of Ohio in 1903 who still constituted a rural society without concentrated masses of population in various areas of the state and for whom the adoption of the Hanna Amendment would have no immediate or foreseeable effect.[4]

Furthermore, the party type ballot was in use in Ohio in 1903, and citizens who voted a party ticket were counted as having voted for all issues on the ballot which had been endorsed by their party's convention, even though the voter failed to cast a specific vote on the issue.[5]

Accordingly, the vote on the Hanna Amendment cannot be considered an expression of the will of the people of Ohio either for or against the question before this court today, which is simply whether or not constitutional rights are being violated by the existing malapportionment in Ohio.

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[4] and [5] That the significance of the Hanna Amendment could not have been apparent to the people of Ohio in 1903 is obvious from a reading of The Cleveland Plain Dealer editorial on page 4 of the November 2, 1903, issue which discusses in detail the proposed amendments to give the veto power to the governor; to relieve stockholders of Ohio corporations of double liability; to classify Ohio cities for municipal government purposes; and to provide a uniform base of taxation, while making only a passing reference to the proposal to guarantee each county one representative. The rural society of 1903 had no reason to be concerned over the implications of such a proposal, since it was a far different society indeed. For example, the lead story on page 1 of that issue of the Plain Dealer was headlined "Bloody Battle with Indians", and described an Indian uprising in Colorado.

See also page 6 of the November 3, 1903, Plain Dealer, and page 6 of the November 6, 1903, issue which discuss party endorsements of the proposed amendments and which again minimize the importance of the Hanna Amendment.

6. (Opinion, page 32, infra) "There does not seem to be much reason for a bicameral legislature if both houses are required to be apportioned on the same basis."

This statement clearly begs the question. The constitutional issue is whether a state legislature, bicameral or not, is required to be apportioned on a fair and rational basis.

7. (Opinion, page 32, infra) "Whenever the people of Ohio desire to change their Constitution, the way is wide open for them to do it."

Any court in any state could, with this approach, dispose of its troublesome malapportionment problem. But getting the problem out of court will not make it go away.

As can be amply demonstrated at a hearing on the merits of this appeal, all the mechanism of constitutional change in Ohio lies securely in the hands of those who benefit from the present malapportionment and would lose their favored position by reapportionment.

Obviously, the three-fifths majority in each house required to place a constitutional amendment on the Ohio ballot (Ohio Constitution, Article XVI, Section 1) can never be obtained on such an issue, nor is the two-thirds majority vote required to place the call of a constitutional convention on the ballot (Ohio Constitution, Article XVI, Section 2) a realistic possibility. Furthermore, the makeup of such a convention, even if convened, is determined by the very legislature whose malapportionment Appellant complains of. For this reason, the automatic vote on a constitutional convention in 1972 (which in any event could hardly be considered an adequate remedy for a constitutional breach found to exist today) offers no hope for relief (Article XVI, Section 3).

Finally, without considering whether Ohio's initiative provision (Ohio Constitution, Article II) offers any prac-

tical relief to Appellant, the court cites 31 proposals to amended the Ohio Constitution by initiative petition which have appeared on the ballot in Ohio since 1913.

None of these proposals involved legislative apportionment, as is made clear by the stipulated evidence which, to the contrary, shows that all attempts to place a reapportionment issue on the Ohio ballot have failed and must fail because, as will be demonstrated in Briefs and Arguments on the merits, the cumbersome and expensive initiative procedure can be completely frustrated by the very counties which would lose their separate representation by the deletion of the Hanna Amendment.

The court also cites in support of its conclusion the rejection of a constitutional convention by the people of Ohio when that issue appeared on the ballot in 1932 and 1952. That argument, it is submitted, proves too much and therefore proves nothing. It is impossible to isolate the motives of voters in voting for or against a constitutional convention call, since such campaigns become charged with issues covering the entire spectrum of state government.

In any event, can the constitutional right of fair representation be made to depend on the will of the majority? There are some cynics who claim today that the Bill of Rights could not pass a referendum vote in at least some of our states. One need not be that cynical, however, to suggest that the utter impossibility of ever determining what the will of the majority is requires that fair representation not be made subject to such an illusive concept.

Under our system of government, the will of the majority is, in theory, expressed through its elected representatives, and that simple proposition lies at the very heart of the problem of malapportionment. The will of the majority can only be expressed through fair representation

and the right to such representation is surely a basic constitutional right which should be protected by the judiciary regardless of the existence or nonexistence of a theoretical political remedy. District courts in other states having initiative provisions have recognized this principle in rejecting the political remedy by initiative defense in reapportionment lawsuits, *Thigpen v. Meyers*, 211 F. Supp. 826 (D. Wash. 1962); *League of Nebraska Municipalities v. Marsh*, 209 F. Supp. 189 (D. Neb. 1962); *Moss v. Burkhart*, 207 F. Supp. 885 (D. Okla. 1962).

8. (Opinion, pages 33-34, infra) "It (Ohio's apportionment) seeks to protect the masses by giving them control of the Senate. The system is one of checks and balances designed to protect minority as well as majority interests, but with neither in control. Such an apportionment, in our judgment, cannot be said to be irrational."

This portion of the court's opinion indicates a lack of understanding of the real nature of the problem of malapportionment. It seems to be describing a form of government foreign to anything we have known in this country. What is this strange doctrine of protection of the masses? Whoever heard of a system of checks and balances *within* a legislative body? Does the court really believe that the stalemate legislature they are describing is rational? Does the court seriously suggest that majority rule is no longer to be considered the very foundation of our democratic form of government?

What has happened in this country and in this state since the beginning of this century is obvious and ominous. With the industrialization of our society, with our transformation from a static to a mobile people, with our exploding population and its shift from rural to urban areas, we have in fact a new society with a new form and new needs.

Our state legislative bodies have not been readjusted to fit this new society and by their very nature cannot themselves make the adjustment. Judicial relief was desperately needed, and *Baker v. Carr* gave promise of that relief.

If, however, lower courts refuse to recognize the real nature of the problem and attempt to justify unfair and unequal representation on the basis of some arbitrary and meaningless standard then the constitutional right of fair representation will indeed be a hollow right. This country is now experiencing a serious crisis in race relations because for too many years an artificial, legalistic, and unrealistic concept of separate but equal was permitted to masquerade as fairness and equality. There is grave danger that fairness and equality in legislative apportionment may likewise be frustrated by an illusive and delusive concept of unequal but rational—*i.e.*, there is some sort of half-hearted explanation.

CONCLUSION

Appellant respectfully submits that the trial court has completely misconstrued the impact and import of *Baker v. Carr*, and instead of mere confusion regarding the limits beyond which a state may not go in depriving a voter of fair and equal representation, we now have utter chaos.

The concepts introduced by the trial court, unless clarified by this Court, will likewise confuse and becloud similar questions present in reapportionment cases not yet before this Court. Review by this Court is required to prevent unfairness and inequality from being structured and institutionalized into a new, strange body of law. These questions are substantial, and probable jurisdiction should be noted and this appeal set down for briefing and oral argument on the merits prior to the nomination of candidates in the spring of 1964 for the next session of the Ohio General Assembly.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned attorney for plaintiff herewith certifies that on the 6. day of September, 1963, he served copies of the foregoing Jurisdictional Statement on each of the parties to this suit, by mailing a copy by U. S. Mail, postage prepaid, to their attorneys of record. William Saxbe, Attorney General of the State of Ohio, and Gerald Donahue, First Assistant Attorney General, State House Annex, Columbus, Ohio; Hugh A. Sherer and William E. Knepper, 150 E. Broad St., Columbus, Ohio.

Stewart R. Kelly

Attorney for Plaintiff.

APPENDIX A

In the United States District Court
for the Southern District of Ohio
Eastern Division

JAMES D. NOLAN,

Plaintiff,

vs.

JAMES A. RHODES, Governor of Ohio, et. al.,

Defendants.

LEONARD M. SIVE, et al.,

Plaintiffs,

vs.

HARRY ELLIS, et al.,

Defendants.

OPINION

[Filed June 12, 1963]

Before: WEICK, Circuit Judge, WEINMAN and PECK, District Judges

WEICK, Circuit Judge

These two actions were consolidated for hearing because each one questions the validity of the apportionment of Ohio's House of Representatives and seeks an adjudication that the last sentence in Article XI §2 of the Constitution of Ohio be declared unconstitutional and void in violation of the Fourteenth Amendment to the Constitution of the United States. This sentence in the Ohio Constitution reads: "Provided, however, that each county shall have one representative." Since the actions involved the constitutionality of state law, the Chief Judge of the Circuit

constituted this three-judge court to hear them pursuant to Title 28 U.S.C. §§2281 and 2284.

The plaintiff in the *Nolan* case is a resident of Cuyahoga County which contains the largest population in the State. He is a qualified and registered voter in the State and County and a taxpayer. He brings the action in his own behalf and on behalf of all others similarly situated.

The plaintiffs in the *Sive* case are residents, electors and taxpayers of Hamilton County, which is next largest in population and they likewise sue as a class.

The defendants in *Nolan* are the Governor, Auditor and the Secretary of the State of Ohio. Under Article XI §11 of the Ohio Constitution they are charged with the duty of ascertaining the ratio of representation, according to the decennial census, of the number of representatives and senators each county or district shall be entitled to elect to the General Assembly within the next ten years. In *Sive* certain election officials are named as additional defendants.

A stipulation of facts was agreed to by the parties and is adopted as findings of fact. Trial briefs were filed. The consolidated cases were argued orally. The arguments were transcribed and briefs on the merits were filed. The entire subject has been treated exhaustively by able counsel.

The Eleventh Amendment does not bar the bringing of these actions.

At the threshold, we are met with the contention of the defendants that these actions in reality are suits against the State of Ohio which affect its form of government and that the Eleventh Amendment to the Constitution of the United States does not extend the judicial power to a suit against a state. They cite: *Ford Motor Co. v. Department of Treasury, State of Indiana*, 323 U.S. 459; *Hans v. Louisi-*

ana, 134 U.S. 1; *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682.

The present actions, however, were brought under the Civil Rights Act (28 U.S.C. §1343) against the individual officers of the State to enjoin the commission by them of acts alleged to be in violation of the Constitution of the United States. *Baker v. Carr*, 369 U.S. 186 is implicit that the actions are maintainable. See also: *Peterson v. City of Greenville*, 373 U.S. ... (1963); *Georgia R. R. and Banking Co. v. Redwine*, 342 U.S. 299. It makes no difference whether a state constitution rather than a statute is involved. *Standard Computing Scale Co. v. Farrel*, 249 U.S 571.

Ohio's Legislative System

Ohio has a bicameral legislature following the federal pattern and consisting of a Senate and House of Representatives. The 105th General Assembly has 137 members of the House elected biennially by the electors of the respective counties for terms of two years. The Senate consists of 33 Senators elected by the electors of the respective senatorial districts on a staggered basis for terms of four years.

There are 88 counties in the State and 35 Senatorial Districts. The State has a population of 9,706,397 according to the census taken in 1960.

Apportionment of the General Assembly is provided for by Article XI of the Ohio Constitution. In substance, the Senate is apportioned by population and the House by area and population. The entire population of the state is divided by the number of 100 to determine the ratio of representation in the House for the next ten years. Every county having a population equal to one-half of such ratio shall be entitled to one representative. Counties having

a population in excess of one ratio are entitled to a proportional number of representatives. Prior to November 3, 1903 if a county entitled to separate representation had a decrease in population below the one-half ratio, it had representation by being attached to the adjoining county having the least number of inhabitants. Because of the Amendment of November 3, 1903 each county was guaranteed one representative.

The Constitution does not limit the number of representatives a county may gain by increase of its population in relation to the state's total population. Article XI, §3.

The apportionment of the Ohio Senate is based as nearly as practicable upon population.

The enactment of any law in Ohio requires a majority vote of both Senate and House and may be vetoed by the Governor who is elected by the electors of the state. The veto can be overridden by a three-fifth's vote in both houses.

Laws may be initiated by petition and submitted to a vote by the electors of the state. Article II § 1 Ohio Constitution. All laws except those providing for tax levies, appropriations for current expenses and emergency measures are subject to a referendum by the electors of the state. Article II §1c Ohio Constitution.

The Constitution of Ohio can be amended only by a majority vote of the electors of the state voting on the proposal to amend. Article XVI §§1 & 3, Article II §1b Ohio Constitution. Proposals to amend may be submitted by initiative petition (Article II §1a Ohio Constitution) or by joint resolution of the General Assembly. Article XVI §1 Ohio Constitution.

Each twenty years there is submitted to the electors of the state the question whether a constitutional convention

shall be called. Article XVI §3 Ohio Constitution. The issue was last so submitted in 1952.

It is readily apparent from this review of Ohio's substantially different and perhaps unique governmental machinery that the factual situation here existing differs from that which has been before other courts considering apportionment problems.

Does Ohio's system of apportionment of its House of Representatives discriminate invidiously against plaintiffs?

Plaintiffs contend that both houses in Ohio must be apportioned in accordance with population and any substantial deviation therefrom in either house results in an invidious discrimination against them in violation of the Equal Protection Clause of the Federal Constitution. They do not seriously argue that the Amendment was unconstitutional at the time it was adopted in 1903.[1] They contend, rather, that it has since become unconstitutional because of shifts in Ohio's population from rural to urban areas of the state and other changes in conditions.

It should be pointed out that Ohio's apportionment was not adopted by the state legislature, but by the people of the state in their Constitution. The Amendment to the Constitution under attack here was adopted in 1903 by an overwhelming majority of the electors of the state, i.e., 98% for and 2% against and has been in effect for nearly sixty years.

It was conceded that the apportionments made by the Governor, Auditor and Secretary of the State each ten years since the Constitution of 1861 was adopted have been in conformity with the provisions of the Constitution of Ohio. Plaintiffs' only complaint is that Ohio's Consti-

[1] Counsel for Nolan admitted in argument that the Amendment was valid when passed.

tution guarantees to each county one representative in the House and that that constitutes invidious discrimination against them.

No question has been raised in these cases concerning the apportionment of Ohio's Senate, which is by population of the senatorial districts. Defendants assert that the urban centers have overwhelming control of the state Senate. They have computed figures from the stipulated facts (Exhibit P) which indicate that the electors of the senatorial districts in which the seventeen most populous counties of the state are included are represented in the 105th General Assembly by 26 senators or 78.7% of the 33 members of the senate. These 17 counties, they say, contain 68.6% of the total population of the state. Defendants further claim that in the 105th General Assembly the electors of the senatorial districts in which the eight most populous counties are included are represented by 20 senators or 60.6% of the whole senate. These 8 most populous counties contain 54.9% of the state's total population. Plaintiffs in their brief point out that the senatorial districts containing the 17 largest counties contain a total of 45 counties and 79% of the population and that the 8 largest senatorial districts containing 12 counties elect 58% of the Senate and have 57% of the population.

It is clear that the Senate is properly apportioned according to population.

At the time the Ohio Constitution was amended in 1903 to provide for one representative in the House for each county only ten counties were below the ratio of representation and hence were attached to other counties. Forty-eight counties are now below the ratio of representation, but in view of the 1903 proviso can elect 48 out of the 137

members of the House in the 105th General Assembly. Cuyahoga County can elect 17 (one for each 96,935 of population).[2] Vinton County which is the smallest county in the state with a population of 10,274 can elect one representative. Hamilton County can elect 9.

Plaintiffs argue that the vote of an elector in Vinton County for state representative is worth almost 10 times as much as the vote of an elector in Cuyahoga County; that the ratio between Vinton and Lake Counties is almost 15 to 1, and 10 to 1 between Vinton and Summit, Clark, Montgomery, Franklin, Hamilton, Stark, Mahoning, Lucas and Trumbull Counties. Similarly, disparities in ratio exist with respect to other small counties.

This same argument could be made with equal force by the largest states in the Union, such as New York, California, Pennsylvania and Illinois, with respect to the representation allowed the smaller states in Congress by the federal constitution. Vermont, Nevada, Wyoming and Alaska each have two senators as do the large states. The smaller states are also allowed at least one representative in the House of Representatives. Compared with the Ohio House, the difference is only in the degree. The Ohio Senate is apportioned according to population. The United States Senate is not. We realize that the federal example is not entirely apposite, but both federal and Ohio governments have Constitutions with Bills of Rights. Counties are units of state government. What is rational for the federal government ought not be condemned as irrational and invidious for Ohio. *Committee v. Tawes*, 184 Atl. 2d 715.

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[2] The ratio of representation in 1960 was 97,064. One-half ratio was 48,532.

As shown by the following table compiled from Exhibit O to the stipulation, twenty urban counties have not been overlooked in their representation in the House of Representatives.

County		*Population*	*Principal City*	*No. Reps.*
(1)	Cuyahoga	1,647,895	Cleveland and suburbs	17
(2)	Hamilton	864,121	Cincinnati	9
(3)	Franklin	682,962	Columbus	7
(4)	Montgomery	527,080	Dayton	5
(5)	Summit	513,569	Akron	5
(6)	Lucas	456,931	Toledo	5
(7)	Mahoning	300,480	Youngstown	3
(8)	Stark	340,345	Canton & Massillon	3
(9)	Trumbull	208,526	Warren	2
(10)	Butler	199,076	Hamilton & Middletown	2
(11)	Lorain	217,500	Lorain & Elyria	2
(12)	Clark	131,440	Springfield	1
(13)	Allen	103,691	Lima	1
(14)	Richland	117,761	Mansfield	1
(15)	Jefferson	99,201	Steubenville	1
(16)	Licking	90,242	Newark	1
(17)	Marion	60,221	Marion	1
(18)	Scioto	84,216	Portsmouth	1
(19)	Erie	68,000	Sandusky	1
(20)	Muskingum	79,159	Zanesville	1
			Total Representatives from Twenty Counties	69
			Total Membership of House in 105th General Assembly	137

There does not seem to be much reason for a bicameral legislature if both houses are required to be apportioned on the same basis.

Whenever the people of Ohio desire to change their Constitution the way is wide open for them to do it. If the Legislature does not make the proposal, the people can do it by initiative petition. In addition, the people automatically have the opportunity each twenty years to vote for a constitutional convention. Ohio had a constitutional convention after the 1903 Amendment was passed, namely, in 1912, which took no action to change the apportionment of

the General Assembly. In this convention "Home Rule" for municipalities, initiative and referendum, workmen's compensation and other liberal measures were adopted. In 1932 and again in 1952 the state electorate voted against calling a constitutional convention. Not one county in the state voted in favor of calling it in 1952. This would indicate rather clearly that the people in the counties in which plaintiffs reside did not then want any tampering with their Constitution.

Since 1913, 31 proposals to amend the Constitution of Ohio have been submitted to the electorate by initiative petition. 9 were adopted and 22 were rejected. During this period 53 such proposals were submitted to the voters by joint resolutions of the General Assembly. 32 were adopted and 21 rejected.

Despite the foregoing impressive record, plaintiffs complain about the practical difficulties in inducing Ohio's Legislature to submit proposals to amend the Constitution for a vote of the people or in securing signatures on initiative petitions. The fact is that in almost every state election there are proposals on the ballot to amend Ohio's Constitution. The contention also overlooks the right of the people to vote for a constitutional convention every twenty years. We submit it ought not to be easy to amend or change the basic law of the state or nation. If the rule were otherwise, Ohio would be flooded with crack-pot schemes some of which today are being urged in respect to amending the Constitution of the United States.

Ohio's constitutional apportionment takes into account the varying interests of its citizens engaged in different occupations in the 88 counties of the state. It reflects a determination of the people to give representation to each of the counties even though some of them are thinly populated. It seeks to protect the masses by giving them control

of the Senate. The system is one of checks and balances designed to protect minority as well as majority interests, but with neither in control. Such an apportionment, in our judgment, cannot be said to be irrational.

Ohio's apportionment formula is not unusual, but is one of the most common methods appearing in state constitutions that recognize both population and area. About one-half of the states in the Union have legislative bodies so apportioned.[3] Can it be said that they are all irrational?

Ohio had wide discretion in making a classification and even though it may result in some unequality and discrimination it "will not be set aside if any state of facts may reasonably be conceived to justify it." *McGowan v. Maryland*, 366 US. 420, 426.

In *MacDougall v. Green*, 335 U.S. 281 the Court said:

> "It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States."

In *Williamson v. Lee Optical Co.*, 348 U.S. 489 the Court said: "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

The burden of proof of unconstitutionality is upon the plaintiffs. *Metropolitan Casualty Co. v. Brownell*, 294 U. S. 580, 584.

In our judgment, Ohio's Constitution does not discriminate invidiously against the plaintiffs nor does it deprive

[3] A Commission Report—Apportionment of State Legislatures—Advisory Commission on Intergovernmental Relations, December 1962 p. 39.

them of the equal protection of the laws. It was not irrational to allow one representative for each county. *WMCA v. Simons*, 208 F Supp. 368 (S.D., N.Y.); *Sobel v. Adams*, 208 F. Supp. 316, 323 (S.D., Fla.). Ohio's Constitution does not discriminate against anyone on account of race, religion or previous condition of servitude.

We do not understand that plaintiffs want more seats in the House than 17 for Cuyahoga County and 9 for Hamilton County which they now have. What they seek is to take away from the smaller counties their right to one representative for each county and attach these counties to others. This would result in a reduction of house membership from 138 to 111. The votes of Cuyahoga County's 17 representatives and Hamilton County's 9 would then bear a higher proportion to the total vote in the House than they now do. It would dilute the strength of the minority and increase the strength of the majority vesting in the latter absolute control of both houses. In our opinion, the majority is entitled to protection the same as the minority, but this does not mean that they should dominate and control both houses in the state legislature.

Plaintiffs' remedy is at the polls and not in the courts.

This opinion is adopted as findings of fact and conclusions of law.

Judgment may be entered in both cases in favor of defendants and dismissing the complaints.

Dated Columbus, Ohio
June 12, 1963.

/s/ PAUL C. WEICK,
United States Circuit Judge
/s/ CARL A. WEINMAN,
United States District Judge
/s/ JAMES PECK,
United States District Judge

APPENDIX B
OHIO CONSTITUTION

ARTICLE XI
Apportionment

1. Apportionment for Members of the General Assembly; Ratio of Representation in House.

The apportionment of this State for members of the General Assembly, shall be made every ten years, after the year one thousand eight hundred and fifty-one, in the following manner: The whole population of the state, as ascertained by the federal census, or in such other mode as the General Assembly may direct, shall be divided by the number "One Hundred," and the quotient shall be the ratio of representation in the House of Representatives, for ten years next succeeding such apportionment.

No apportionment herein provided for shall affect the election or term of office of any member of the General Assembly chosen before it was made. (Amended November 6, 1956.)

2. Same Subject.

Every county having a population equal to one-half of said ratio, shall be entitled to one representative; every county, containing said ratio, and three-fourths over, shall be entitled to two representatives; every county containing three times said ratio, shall be entitled to three representatives; and so on, requiring after the first two, an entire ratio for each additional representative. Provided, however, that each county shall have one representative. [As Amended November 3, 1903.]

3. Same Subject.

When any county shall have a fraction above the ratio, so large, that being multiplied by five, the result will be equal to one or more ratios, additional Representatives

shall be apportioned for such ratios, among the several sessions of the decennial period, in the following manner: if there be only one ratio a Representative shall be allotted to the fifth session of the decennial period; if there are two ratios, a Representative shall be allotted to the fourth and third sessions, respectively; if three, to the third, second, and first sessions, respectively; if four to the fourth, third, second, and first sessions, respectively.

4. Same Subject.

Any County, forming with another county or counties, a Representative district, during one decennial period, if it have acquired sufficient population at the next decennial period, shall be entitled to a separate representation, if there shall be left, in the district from which it shall have been separated, a population sufficient for a Representative; but no such change shall be made, except at the regular decennial period for the apportionment of Representatives.

5. Same Subject.

If, in fixing any subsequent ratio, a county, previously entitled to a separate representation, shall have less than the number required by the new ratio for a Representative, such county shall be attached to the county adjoining it, having the least number of inhabitants; and the representation of the district, so formed, shall be determined as herein provided.

6. Ratio for a Senator.

The ratio for a Senator shall, forever hereafter, be ascertained, by dividing the whole population of the State, by the number thirty-five.

6a. Additional Senators.

When any Senatorial district shall have a fraction above the ratio, so large, that being multiplied by five

the result will be equal to one or more ratios, additional Senators shall be elected for two year terms and shall be apportioned for such ratios, among the several sessions of the decennial period, in the following manner: if there be only one ratio a Senator shall be allotted to the fifth session of the decennial period; if there are two ratios, a Senator shall be allotted to the fourth and third sessions, respectively; if three, to the third, second and first sessions, respectively; if four to the fourth, third, second, and first sessions, respectively provided that no additional senator mentioned herein shall be elected if his election would result in his senatorial district having as members of the next following general assembly a number of senators in excess of its number of full ratios plus one. (Adopted November 6, 1956.)

7. Senatorial Districts.

The State is hereby divided into thirty-three Senatorial districts, as follows: the County of Hamilton shall constitute the first Senatorial district; the counties of Butler and Warren, the second; Montgomery and Preble, the third; Clermont and Brown, the fourth; Greene, Clinton and Fayette, the fifth; Ross and Highland, the sixth; Adams, Pike, Scioto and Jackson, the seventh; Lawrence, Gallia, Meigs and Vinton, the eighth; Athens, Hocking and Fairfield, the ninth; Franklin and Pickaway, the tenth; Clark, Champaign and Madison, the eleventh; Miami, Darke and Shelby, the twelfth; Logan, Union, Marion and Hardin, the thirteenth; Washington and Morgan, the fourteenth; Muskingum and Perry, the fifteenth; Delaware and Licking, the sixteenth; Knox and Morrow, the seventeenth; Coshocton and Tuscarawas, the eighteenth; Guernsey and Monroe, the nineteenth; Belmont and Harrison, the twentieth; Carroll and Stark, the twenty-first; Jefferson and Columbiana, the twenty-second; Trumbull and Mahoning, the twenty-

third; Ashtabula, Lake and Geauga, the twenty-fourth; Cuyahoga, the twenty-fifth; Portage and Summit, the twenty-sixth; Medina and Lorain, the twenty-seventh; Wayne and Holmes, the twenty-eighth; Ashland and Richland, the twenty-ninth; Huron, Erie, Sandusky and Ottawa, the thirtieth; Seneca, Crawford and Wyandot, the thirty-first; Mercer, Auglaize, Allen, Van Wert, Paulding, Defiance and Williams, the thirty-second; and Hancock, Wood, Lucas, Fulton, Henry and Putnam, the thirty-third. For the first decennial period, after the adoption of this constitution, each of said districts shall be entitled to one Senator, except the first district, which shall be entitled to three Senators.

8. Same Subject.

The same rules shall be applied, in apportioning the fractions of Senatorial districts, and in annexing districts, which may hereafter have less than three-fourths of a Senatorial ratio, as are applied to Representative districts.

9. Same Subject.

Any county forming part of a Senatorial district, having acquired a population equal to a full Senatorial ratio, shall be made a separate Senatorial district, at any regular decennial apportionment, if a full Senatorial ratio shall be left in the district from which it shall be taken.

10. Apportionment of Representatives for Ten Years.

For the first ten years, after the year one thousand eight hundred and fifty-one, the apportionment of Representatives shall be as provided in the schedule, and no change shall ever be made in the principles of representation, as herein established, or, in the Senatorial districts, except as above provided. All territory, belonging to a county at the time of any apportionment, shall, as to the

right of representation and suffrage, remain an integral part thereof, during the decennial period.

11. When the Governor, Auditor and Secretary of State to Determine Ratio of Representation.

The Governor, Auditor, and Secretary of State, or any two of them, shall, at least six months prior to the October election, in the year one thousand eight hundred and sixty-one, and, at each decennial period thereafter, ascertain and determine the ratio of representation, according to the decennial census, the number of Representatives and Senators each county or district shall be entitled to elect, and for what years, within the next ensuing ten years, and the Governor shall cause the same to be published, in such manner as shall be directed by law.

Judicial Apportionment

12. Judicial Purposes.

For Judicial purposes, the State shall be apportioned as follows:

First District.

The county of Hamilton, shall constitute the first district, which shall not be subdivided; and the Judges therein, may hold separate courts, or separate sittings of the same court, at the same time.

Second District.

The counties of Butler, Preble and Darke shall constitute the first subdivision, Montgomery, Miami and Champaign, the second, and Warren, Clinton, Greene and Clark, the third subdivision, of the second district; and, together, shall form such district.

Third District.

The counties of Shelby, Auglaize, Allen, Hardin, Logan, Union and Marion, shall constitute the first subdivision,

Mercer, Van Wert, Putnam, Paulding, Defiance, Williams, Henry and Fulton, the second, and Wood, Seneca, Hancock, Wya dot and Crawford, the third subdivision, of the third district; and, together, shall form such district.

Fourth District.

The counties of Lucas, Ottawa, Sandusky, Erie and Huron, shall constitute the first subdivision, Lorain, Medina and Summit, the second, and the county of Cuyahoga, the third subdivision, of the fourth district; and, together, shall form such district.

Fifth District.

The counties of Clermont, Brown and Adams, shall constitute the first subdivision, Highland, Ross and Fayette, the second, and Pickaway, Franklin and Madison, the third subdivision, of the fifth district; and, together, shall form such district.

Sixth District.

The counties of Licking, Knox and Delaware, shall constitute the first subdivision, Morrow, Richland and Ashland, the second, and Wayne, Holmes and Coshocton, the third subdivision, of the sixth district; and, together shall form such district.

Seventh District.

The counties of Fairfield, Perry and Hocking, shall constitute the first subdivision, Jackson, Vinton, Pike, Scioto and Lawrence, the second, and Gallia, Meigs, Athens and Washington, the third subdivision, of the seventh district; and, together, shall form such district.

Eighth District.

The counties of Muskingum and Morgan, shall constitute the first subdivision, Guernsey, Belmont and Monroe, the second, and Jefferson, Harrison and Tuscarawas, the third

subdivision, of the eighth district; and, together, shall form such district.

Ninth District.

The counties of Stark, Carroll and Columbiana, shall constitute the first subdivision, Trumbull, Portage and Mahoning, the second, and Geauga, Lake and Ashtabula, the third subdivision, of the ninth district; and, together, shall form such district.

13. New Counties Attached.

The General Assembly shall attach any new counties, that may hereafter be erected, to such districts, or subdivisions thereof, as shall be most convenient.

JURISDICTIONAL STATEMENT

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In The

Supreme Court of the United States

LEONARD M. SIVE, ELIZABETH R. CASH, FRANCES D. LYON, ROBERT W. HILTON, JR., ROBERT A. RYAN, HARRIS K. WESTON, MORSE JOHNSON,

Appellants,

vs.

HARRY ELLIS, EARL MATHENY, LLOYD S. ROUSH, and LEO TUMBELSON, Individually and as members of and comprising the Board of Elections of Adams County, Ohio; WILLIAM DRAKE, MARK DAY, L. F. HUBER, and R. W. BUCHANAN, Individually and as members of and comprising the Board of Elections of Brown County, Ohio; HOMER VANZANT, E. I. COLLIER, CLIFFORD HUDSON, and C. F. FARIS, Individually and as members of and comprising the Board of Elections of Highland County, Ohio; LAWRENCE R. LYONS, JOHN M. REED, GEORGE W. BEHYMER, and RAY McLAUGHLIN, Individually and as members of and comprising the Board of Elections of Clinton County, Ohio; JAMES A. RHODES, Governor of Ohio; ROGER W. TRACY, Auditor, State of Ohio; TED W. BROWN, Secretary of State of Ohio,

Appellees.

On Appeal From the United States District Court In and For the Southern District of Ohio

JURISDICTIONAL STATEMENT

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JAMES A. RHODES, Governor of Ohio;
ROGER W. TRACY, Auditor, State of Ohio;
TED W. BROWN, Secretary of State of Ohio,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

JURISDICTIONAL STATEMENT

Opinion Below

The opinion below has not yet been officially or unofficially reported, but a copy is appended hereto in full as Appendix A, infra. The opinion was also adopted as findings of fact and conclusions of law by the trial court.

Grounds on Which Jurisdiction of This Court Is Invoked

(i) Appellants, plaintiffs below, brought an action as residents, citizens, electors, and taxpayers of Hamilton County, Ohio, on behalf of themselves and others similarly situated in the United States District Court for the Southern District of Ohio against appellees, defendants below, some of whom were members of boards of elections in certain counties in Ohio and others (the governor, state auditor and secretary of state of Ohio) were members of the state legislative apportionment board, for declaratory and injunctive relief, seeking to invalidate, as in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, a proviso in the Ohio Constitution, popularly known as the Hanna Amendment, which appellants claimed invidiously discriminated against them and others similarly situated, in apportioning members of the Ohio House of Representatives among the residents of Ohio.

The appellants invoked federal court jurisdiction under Section 1 of the Fourteenth Amendment to the United States Constitution, the Federal Civil Rights Statute, Title 28, U.S.C. Section 1343, and the Federal Declaratory Judgment Statute, Title 28 U.S.C. Section 2201.

The case was submitted to a three judge federal district court pursuant to Title 28 U.S.C. Sections 2281 and 2284.

This case was consolidated for hearing with another case, *Nolan* v. *DiSalle et al,* (now *Nolan* v. *Rhodes et al*), which also involved the constitutionality under the Fourteenth Amendment to the United States Constitution of the same state constitutional provision.

(ii) After a hearing on the merits at which almost all the facts were stipulated, the district court on June 12, 1963, entered a judgment dismissing both complaints. That judgment is now sought to be reviewed here. Notice of Appeal was filed on July 12, 1963 in the United States District Court for the Southern District of Ohio.

(iii) The statutory provision believed to confer on this court's jurisdiction of this appeal is Title 28, U.S.C. Section 1253 (appended hereto as Appendix B), which gives a right of appeal direct to this court from the judgment of a three judge federal district court convened pursuant to Title 28 U.S.C. Sections 2281 and 2284.

(iv) Included in the cases believed to sustain the jurisdiction of this court in this case are *Baker* v. *Carr*, 369 U.S. 186, 7 L. ed. 2d 663, 82 S. Ct. 715 (1962), *WMCA, Inc.* v. *Simon*, 370 U.S. 190, 8 L. ed. 430, 82 S. Ct. 1328 (1962), *Gray* v. *Sanders*, 372 U.S. 368, 9 L. ed. 2d 821, 83 S. Ct. 801 (1963), and the large group of cases involving state legislative apportionment now pending in this Court on appeal from three judge district courts in which this court has already noted probable jurisdiction.

(v) Involved in this case is validity of the proviso, added by amendment in 1903 (popularly known as the Hanna Amendment) to Article XI, Section 2 of the Ohio Constitution. Said amendment reads as follows:

> "Provided, however, that each county shall have one representative."

Said Article XI is set out in full in Appendix C, infra.

Questions Presented

(i) Whether the Fourteenth Amendment to the United States Constitution is violated by Article XI of the Ohio Constitution as amended in 1903, providing for state legislative apportionment which for Ohio's House of Representatives limits representation of the residents of populous counties, while giving the residents of each of the State's eighty-eight counties one representative regardless of its population, thus producing disparities in ratio of representation, both horizontal and vertical, as between the various counties in every degree from 2 to 1 to 14.5 to 1, and which produces mal-apportionment to the extent that only 28.4% of the state's population is represented by a majority in that house.

(ii) Whether under the Fourteenth Amendment votes of residents of sparsely populated areas may be disproportionally weighted in their favor for representation in the State House of Representatives to the extent and as set forth in Question 1, if votes of residents of sparsely populated areas are also weighted in their favor for representation in the State Senate, or even if representation in the State Senate can be claimed to be not unreasonably discriminatory.

(iii) Whether judicial relief is precluded where there is gross disparity of voting rights as set forth above, if the State Constitution contains provisions for change by political action initiated by the state legislature, by convention or by the initiative, even though: (a) all attempts to put the issue of legislative reapportionment on the ballet have, historically, failed; (b) political relief can be thwarted by residents of the over-represented areas of the state who benefit from the existing unequal legislative apportionment; and (c) where the stipulated evidence shows that the

expense of the initiative procedure is prohibitive to individual citizens.

(iv) Whether in any event the Constitutional right of fair representation in a state legislature can be made to depend upon the existence or non-existence of a theoretical political remedy, i.e. whether equal protection of the laws can be made to depend on a popular vote.

(v) Whether state legislative apportionment which the trial court found is designed to give representation to counties rather than people violates the Fourteenth Amendment when it produces gross disparities of voting strength and dilutes the vote of residents of more populous counties as described in question 1.

Statement of the Case

Appellants, plaintiffs below, are residents, citizens, electors and taxpayers of Hamilton County, Ohio. They filed this action below claiming that the apportionment formula for representation in the Ohio state legislature as provided by Article XI of the Ohio Constitution and particularly as required for the Ohio House of Representatives by the proviso (popularly known as the Hanna Amendment, adopted in 1903) at the end of Section 2 of said Article XI deprived the appellants of equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States and violated appellants' rights under the Federal Civil Rights Statute. Appellants named as defendants members of boards of elections of several counties of the state and also the governor, state auditor and state secretary of state as members of the state legislature Apportionment Board set up by said Article XI. Appellants sought an injunction prohibiting the board of election defendants from conducting elections for members of the Ohio House of Representative based on apportionment

made in accordance with the Hanna Amendment, and from certifying the results of any such election, enjoining the Apportionment Board defendants from apportioning representation in the Ohio House of Representatives in accordance with the Hanna Amendment, and requiring the latter defendants to apportion such representation without regard to the Hanna Amendment, and a declaratory judgment holding the Hanna Amendment invalid as contravening the Fourteenth Amendment.

Practically all of the facts were stipulated. Such facts plus Ohio and Federal constitutional and legislative history of which the court took judicial notice show as follows:

History of Legislative Apportionment in Ohio

The Ordinance of 1787 for the Northwest territory of which present Ohio was a part required "a proportionate representation of the people in the legislature", which right was ordained to "forever remain unalterable." The Act of Congress (U.S. Statutes at Large Vol. 2, p. 173) providing for admission of Ohio into the Union and providing for choosing representatives to the first state constitutional convention required them to be "apportioned amongst the counties . . . in a ratio of one representative to every twelve hundred inhabitants of each county." The first Ohio Constitution, that of 1802, in Article I, Sections 2 and 6 provided for a House and Senate, the members of both to be apportioned, among the counties in the case of the House, and among districts set up in the case of the Senate, "according to the number of white male inhabitants above twenty-one years of age in each." This remained the rule until the Constitution of 1851 was established. In 1802, Ohio had only nine counties and by 1851 the state divided these into eighty-eight counties, the same number still today.

The Constitution of 1851 in Article XI, Section 1 provided for the House of Representatives that every ten years beginning in 1851 the whole population of the State according to the last federal census should be divided by one hundred, the resulting quotient being the ratio of representation in the House for the succeeding ten years. In Section 2 each county having at least a one-half ratio of representation in population was to be entitled to one representative; every county having one and three-fourths ratios to two representatives, and every county having an entire ratio after the first two was to be entitled to an additional representative for each entire additional ratio, with other sections making provision for an additional representative for the number of bienniums in the decennial period that the county had population in excess of full ratios which equalled multiples of a one-fifth ratio. For those counties which did not have at least a one-half ratio of representation they were to be attached to an adjoining county or counties so that the group together had at least a one-half ratio, and this was to be done each ten years.

For the Senate the same Article XI fixed the ratio of representation at the whole population divided by thirty-five. The State was divided into thirty-three senatorial districts with each district being alloted one Senator except the first district (Hamilton County), which was alloted three. The same rules for apportioning fractions and attaching districts as applied to representative districts were to be applied to senatorial districts having less than a three-fourths ratio.

Section 11 of Article XI set up an apportionment board consisting of the governor, auditor and secretary of state, to determine the ratios for the House and Senate for each decennial period to make up the districts, and to fix the number of representatives or senators each county or district was entitled to have.

Section 10 of Article XI provided ". . . and no change shall ever be made in the principles of representations as herein established."

The effect of the Constitution of 1851 was to make the representation in the Senate very roughly apportioned according to population with a distinct advantage to less populous areas in allowing one senator for a district having only a three-fourths ratio, and to make representation in the House somewhat less proportional to population with somewhat heavier weighting in favor of the less populous counties by allowing one representative for each county having only a one-half ratio in population.

The apportionment rules of the 1851 Constitution remained unchanged until the famous Mark Hanna, who had become the "political boss" of the state and United States Senator by the turn of the century. He could have insured his reelection to the United States Senate (as until the adoption of the Seventeenth Amendment to the Federal Constitution in 1913 United States Senators were chosen by the state legislatures of their respective states) by increasing the representation of the rural counties in the House since they were practically all of his party. It is said that through his influence, the General Assembly placed on the ballot in November 1903 an innocent appearing amendment to be added to Section 2 of Article XI of the 1851 Constitution which amendment was forever thereafter to be known as the "Hanna Amendment." It read as follows: "Provided, however, that each county shall have one vote."

In 1903 there were only ten counties with less than a one-half ratio population. The danger in this harmless looking proviso was apparently not appreciated by anyone because there was no organized opposition to it. Indeed both political parties supported it. In accordance with the rules in effect at the time, a vote for a straight party

ticket automatically was also a vote for the Hanna Amendment. As a result it was adopted overwhelmingly on November 3, 1903.

As time went on, however, with the migration of population from the rural areas to the cities, by 1930, forty-six, or over half of the counties of the state, had become reduced to less than a one-half ratio in population, but still by virtue of the Hanna Amendment were each entitled to one representative in the House. By that time the malapportionment inherent in the Hanna Amendment had become obvious to thinking people in the urban counties.

The Ohio Constitution provides that it may be amended by having a proposed amendment placed on the ballot (a) by joint resolution approved by at least 3/5 the members of both houses, (b) by a constitutional convention called by joint resolution approved by at least 2/3 of the members of both houses, (c) by constitutional convention which may be called by popular vote every 20 years, or (d) by the initiative, which requires at least 5% of the voters in at least half of the counties of the state, and 10% of all voters in the state to sign petitions sponsoring the proposal.

In 1929 an initiative proposal involving repeal of the Hanna Amendment was sought to be placed on the ballot, but with forty-six counties as beneficiaries of the Hanna Amendment and the requirement for signatures of five per cent of the electors in one-half of the counties in the State to place an initiative proposal on the ballot, the effort failed for lack of sufficient signatures. Again in 1940 and in 1957 similar efforts were made and met with like failure, the number of counties with less than a one-half ratio of representation in population and therefore directly benefiting from the Hanna Amendment having increased to forty-seven by 1950 and forty-eight by 1960.

In 1960 Ohio had a population of 9,706,397. A full ratio of representation was therefore 97,064, and a one-half ratio was 48,532. By 1960 in addition to the forty-eight counties which were beneficiaries of the Hanna Amendment there were twenty-three other counties with a one-half ratio of representation (or more) in population which did not have a full ratio of representation in population, so that by 1960, seventy-one out of Ohio's eighty-eight counties had less than a full ratio of representation in population for representatives in the Ohio House.

In addition from 1933 to 1961 twelve separate joint resolutions were introduced in the Ohio General Assembly to place a repealer of the Hanna Amendment (or its effect), on the ballot, but all died in committee.

Thus all efforts to repeal or change the Hanna Amendment were ineffective even though in 1956 Section 1 of Article XI was amended to secure every representative in his term if chosen before a new decennial apportionment, and Section 6a was added to Section 6 to provide for additional senators for bienniums for districts having fractions above a ratio, analogous to similar provisions for the House.

Malapportionment and Discrimination Resulting From The Hanna Amendment

The result has been over the years as the proportion of the state's population has grown more and more urban and less and less rural, that the malapportionment of the Ohio House of Representatives has become so gross and accentuated as to produce discrimination in favor of residents of the less populous counties over the more populous with the following results:

As shown by Appendix H, computed from Exhibits N and X and paragraphs 8, 13 and 21 of the Stipulation, the 48 Hanna Amendment counties with only 14.26% of the

state's population have 35.03% of the membership of the House. Counties with less than a full ratio of representation in population and having only 29.39% of the state's population have over 50%, or an absolute majority in the House.

Further computations from the same paragraphs and exhibits and Exhibit A of the Stipulation show the following:

The eight largest counties of Ohio have over 55% of the total population of Ohio, but by reason of the Hanna Amendment, are permitted to elect only 39% of the members of the House of Representatives.

The 16 counties of Ohio with over 100,000 population, having 67.65% of the state's total population, have only 46.7% of the members of the House.

Lake County, with a population of 148,700, is entitled to only one representative in the present House of Representatives whereas Vinton County, with a population of 10,274 and Noble County with a population of 10,982, each has also one representative, a ratio of over 14 to 1.

Hamilton County, with a population of 864,121, is entitled to only 9 representatives, which is the same number as the 9 smallest counties in the state, with a combined population of only 142,825, a ratio of over 6 to 1 on the average and almost 10 to 1 when compared with the smallest counties.

Montgomery County, Ohio, with a population of 527,080, is entitled to have only five representatives in the Ohio House of Representatives, whereas the five smallest counties in Ohio, with a combined total population of only 66,063, are entitled to the same number, a ratio of 8 to 1, on the average, and 10 to 1 when compared to the least populous counties.

By reason of the Hanna Amendment, Appellants' votes as electors in Hamilton County, Ohio are only 1/9th as effective in voting for members of the State House of

Representatives from Hamilton County as votes of electors in Vinton County and Noble County in electing members to the House of Representatives, only one-eighth as effective compared to Morgan County, one-sixth as effective compared to Monroe and Pauling Counties; about one-fifth as effective as votes of the electors in Adams, Carroll, Harrison, Hocking, Holmes, Morrow, Pike and Wyandot Counties; one-fourth as effective as the votes of the electors of Brown, Fayette, Henry, Meigs and Union Counties; and one-third or less as effective as the votes of the electors of Clinton, Coshocton, Defiance, Fulton, Hardin, Highland, Jackson, Mercer, Preble, Van Wert and William Counties.

One can take any of the other populous counties of Ohio and the comparisons are equally disproportionate or more so. In the case of Allen County, Mahony County, and Montgomery County, the discrimination runs as high as 10 to 1; for Columbiana County, Lucas County and Lorain County, almost 11 to 1; for Clark County 13 to 1 and for Lake County almost 15 to 1.

The gross disproportions continue in almost every comparison that can be made between any two counties with discrimination even between counties having less than a full ratio of representation in population of all the way from 2 to 1 to 9 to 1, and with discrimination almost up to 5 to 1 among the Hanna Amendment beneficiary counties themselves.

The result is that depending on what county one may live in, the vote of a resident of one county is worth anywhere from one-half to almost one-fifteenth of the value in representation in the House as the resident of another county, and with almost every conceivable ratio of discrimination in between, depending on which two counties are considered.

In the state Senate while the disproportion is much less severe than in the House, there is also malapportionment

in favor of the less populous areas. Only three-fourths of a ratio is sufficient to entitle a district to one senator. Senate election districts are widely disproportionate in population as shown by Exhibit P of the Stipulation. Thus one area with only 240,352 elects one senator, while another is required to have 321,494 to achieve the same amount of representation in the state Senate. The Exhibit shows other similar malapportionment for the state Senate.

The overrepresentation of the less populous counties has resulted in other discrimination. Thus Pike County, a Hanna Amendment beneficiary, received $171.71 per capita in major distributions, subsidies and shared revenues from the state for the fiscal year ending June 30, 1961 while Lake County, the most discriminated against county in representation, received only about one-fourth as much or $44.94 per capita (Exhibit Y Stipulation). The state legislature which fixes the congressional districts likewise discriminates against the residents of urban counties in requiring them to have for the most part almost two to one or more in population than the legislature requires of the rural districts, in order to have a congressman.

As shown by Exhibit V of the Stipulation manufacturing is the leading occupation in all but two of the ten smallest counties as well as in the ten largest counties in the state. Agriculture is the second leading occupation with construction and retailing following in the ten smallest counties, while construction and retailing follow manufacturing in the ten largest counties. These statistics indicate a remarkable similarity for the most part in the proportionate number of people in various occupations in the counties of Ohio, regardless of their respective populations.

Action of The Trial Court

The trial court after a hearing on the merits found that the Ohio Senate was apportioned according to population, and that therefore it was reasonable to favor the minority in rural areas and thus give them "protection" in apportioning the House; that there would be no need for a bicameral legislative if both houses were apportioned according to population; that since the United States Senate was not apportioned according to population but with equal representation by states it could not be said that the Hanna Amendment in guaranteeing every county regardless of population one representative in the Ohio House was irrational; that because of the various methods of amending the Ohio Constitution including the initiative, appellants had a political remedy, that therefore the Hanna Amendment was reasonable and not in violation of the Fourteenth Amendment. Appellants' complaint was dismissed, and appellants now appeal to this Court.

The Questions Presented Are Substantial

Since *Baker* v. *Carr*, cases are pending in, or on appeal from, federal or state courts in almost every state in the union raising questions of the constitutionality under the Fourteenth Amendment of state legislative apportionment. This court has noted probable jurisdiction and set for argument during this term at least five cases (excluding cross appeals and cases involving racial discrimination) and there are three other cases raising similar issues in which jurisdictional statements have been filed and have not as yet been acted on by the court, all involving state legislative apportionment. There can be little doubt of the importance of the questions raised here and need for their determination by this court. This court's action in noting prob-

able jurisdiction in the cases above mentioned indicate plainly that this court is probably now prepared to lay down the guide lines for federal court intervention in alleged individious discrimination in state legislative apportionment.

The opinion below substantially accepts that there is gross disparity in voting strength per voter in the election of members of the Ohio House of Representatives between the residents or more and less populous counties of Ohio. It does not take issue with any of the almost fantastic variations of apportionment for the Ohio House from county to county with every possible proportion of 1 to 1 to 15 to 1 both vertically and horizontally as set forth above, or the fact that the rural minority can mathematically control the House with less than 30% of the population.

The opinion below, however, seeks to justify its conclusions that apportionment for the state legislature under the Ohio Constitution is not invidiously discriminatory, apparently on the following grounds, although it is somewhat difficult to tell from the trial court's opinion just what its bases are. The court found that the Ohio Senate was apportioned according to population; that it was therefore reasonable to protect the minority in the rural or less populous areas by giving them "protection" in apportioning the House in their favor; that there would be no need for a bicameral legislature if both houses were apportioned according to population; that guaranteeing each county one representative in the House regardless of population cannot be said to be unreasonable since there is a "federal analogy" in that each state is guaranteed two senators in the United States Senate regardless of population; that apportionment in Ohio is fixed by the state constitution not by mere statute; moreover, since there are various means of amending the Ohio Constitution, including the initiative, the appel-

lants had a political remedy; and therefore, the courts should not intervene.

"The Federal Analogy" and Ohio

Although the issue of "the federal analogy" is raised in some of the state legislative apportionment cases as to which this court has already noted probable jurisdiction, and which are now set for argument, the facts vary from case to case so that a decision in one may not be a logical precedent in another. Indeed this court has already said that any claimed analogy to the electoral college or equal suffrage by the states in the United States Senate is not permissible in determining the validity of a county unit system of voting in state wide elections, but expressly reserved the applicability of its decision to state legislative apportionment cases in *Gray* v. *Sanders*, 372 U.S. 368, 9 L.ed 2d 821, 83 S. Ct. 801 (1963).

The federal analogy argument with respect to state legislative apportionment was rejected by the trial courts in *Davis* v. *Mann*, *Reynolds* v. *Sims* and *Beadle* v. *Scholle* now pending and awaiting argument in this court, as well as in *Roman* v. *Sincock* now on appeal in this court with respect to which this court has not as yet taken action on the jurisdictional statement, while accepted by the trial courts in *WMCA, Inc.* v. *Simon* and *Maryland Committee* v. *Tawes* also awaiting argument in this court as well as *Toombs* v. *Fortson*, 205 F. Supp. 248 (Ga. 1962). The above mentioned conflict shows the necessity for decision by this court on the question.

It can be easily demonstrated that there is no true federal analogy to state legislative apportionment in Ohio. The reasons for equal suffrage of the states in the United States Senate, the guarantee of one representative for each state in the federal House of Representatives, the existence of

the Electoral College and the various provisions of the federal constitution guaranteeing states' rights and respecting the limited sovereignty of the respective states are well known and need not be detailed in this jurisdictional statement. Suffice it to say that they all grew out of "the great compromise" which permitted the formation of the United States under our federal constitution. Without that compromise there would have been no Union.

The history of Ohio as indicated in the factual statement above shows that there is not the remotest semblance of an analogy between the counties of Ohio and the states of the United States. In Ohio counties have always been creatures of the state, created by the state with the right of the state to modify or eliminate them. Thus, when Ohio was admitted as a state into the Union its entire area was composed of nine counties. The state broke up these nine counties as the years went on into eighty-eight counties. The Ohio counties had nothing whatever to say with respect to the formation of the state of Ohio or to its form of government. The debates of the various constitutional conventions (prior to the Hanna Amendment) in 1851 and in 1874 further bear out this lack of any federal analogy. Indeed, as stated by the leading text in Ohio on this subject:

> "Generally speaking a *county is not considered a legal person or a separate political entity with any of the attributes of sovereignty*. It is rather a constitutent part of the plan of permanent organization of the state government — a wholly subordinate political sub-division or instrumentality, created and existing almost exclusively with the view of the policy of the state at large, and *serving as a mere agency of the state* for certain specified purposes." (Italics added) 14 O.Jur. 2d 201, Sec. 4.

History of Ohio legislative apportionment given above also shows that beginning with the Ordinance of the North-

west Territory through the Ohio constitutions of 1802 and 1851, and rejected attempts to amend the constitution in 1874, legislative apportionment for both houses of Ohio legislature was based on population except that in 1851 there was a slight weighing in favor of the less populous counties for the House. However as stated by the Supreme Court of Ohio through Judge Ranney, who was a member of the 1851 constitutional convention, in *State ex rel Evans* v. *Dudley*, 1 O.S. 437, 443, 444 (1853).

> "The Constitution apportions political power amongst the *inhabitants* of the state, as nearly equally as possible in proportion to numbers, without regard whatever to property, or indeed, to any other circumstance. Inhabitants alone are represented, a given number in one place exercise the same political power, as a like number in any other locality. I am aware that some departure from the absolute equality of numbers is allowed in favor of the inhabitants of small counties in the constitution of the House of Representatives; but this in no wise changes the basis of representation from population to territory or property."

It is apparent, therefore, that there is no basis in history or reason to justify the Hanna Amendment, nor any federal analogy.

Besides any federal analogy is not permissible under any circumstances since the rights of the states to equal suffrage in the United States Senate is created by the United States Constitution itself, whereas that instrument by the Fourteenth Amendment prohibits the states from denying any person within their borders equal protection of the laws. Even if apportionment of representation in the United States Senate does in fact discriminate between citizens of the states of the United States and could be said to be invidious, it could not be unconstitutional because

it is required by the constitution itself. There is no equal protection clause to supersede and control the equal suffrage of the states in the United States Senate, but by reason of the supremacy clause and the Fourteenth Amendment in the federal constitution, no state constitutional provision such as the Hanna Amendment can invidiously discriminate between its citizens.

There Is No Area or Geographic Justification For The Hanna Amendment

A study of the map of Ohio, locating thereon the various counties which are beneficiaries of the Hanna Amendment, shows that they are distributed throughout the state and that these counties are of all different kinds and sizes and have various kinds of resources with different kinds of soil. Some have good agricultural land – others not. The argument that if such counties were joined together into one electoral district its citizens would have to travel too far to be in touch with their legislators could not today be, if it ever was, a valid reason for guaranteeing every county one representative. With modern roads and methods of transportation, the telephone, radio and television, such an argument obviously is unsound. Indeed when one considers the fact that the Hanna Amendment was not found necessary in the pioneer days when there were no paved roads, telegraph, radio or television, the claim of difficulty of access to, or communication with, representatives today becomes ridiculous.

Area or geography, therefore, cannot justify the Hanna Amendment.

"Protection" of Less Populous or Rural Areas Is No Justification for The Hanna Amendment

The court below acknowledged the extreme disparity of apportionment of the House of Representatives in favor of the less populous or rural areas. Although it does seek to lessen the impact of such conceeded malapportionment by listing a table of the twenty largest counties in the state which together elect a bare majority of less than one in the House, what the opinion does not compute is that those twenty counties have a population of 6,792,416 or 69.98% of the state's total population. In other words, they have to have practically 70% of the state's population to elect 50.37% of the House. Also many of those counties could hardly be called urban with their largest cities being small in population and the counties themselves mostly rural in character. Besides even for the twenty counties listed five of them are among those with less than a full ratio representation under Article XI of the Ohio Constitution.

As pointed out above there are forty-eight Hanna Amendments beneficiary counties with less than a one-half ratio of representation and twenty-three more counties with less than a full ratio or a total of seventy-one counties each being entitled to one representative under the Hanna Amendment and thus having absolute control of the House (total membership of 137) with less than 30% of the population.

The court below, however, says that the Ohio State Senate is based on population and that one house based on population is enough. First of all the trial court's statement is not quite accurate. While it is true that the State Senate is more nearly based on population than the House, it is apparent that apportionment in the State Senate is also weighted in favor of the less populous counties by reason of the constitutional provisions that areas with only a three-

fourths of a ratio of representatives are entitled to one Senator. Exhibit P of this Stipulation also shows that from one senatorial district to another, variations in population are very wide with the weighting in all cases being in favor of the less populous areas. Thus, although it is true that a majority of the senate is elected by almost a majority of the state's total population, from area to area there is obvious discrimination in favor of the less populous areas in apportionment of the state senate.

Granted, however, that the weighting in favor of the less populous areas insofar as the senate is concerned is not so grossly disproportionate as to be deemed invidiously discriminatory, is it sufficient to say that because the Senate apportionment is not so bad as to be unconstitutional this justifies apportioning the House in the onesided manner accomplished by the Hanna Amendment?

The court below says, that, assuming the Senate to be apportioned according to population, discrimination in favor of the less populous areas in representation in the House preserves checks and balances and protects the minority living in those areas, and that without such checks and balances there would be no need for a bicameral legislature.

The Bill of Rights in the state and federal constitutions and the courts are there to protect the minorities. A minority as such is not entitled to representation in the legislature out of proportion to its numbers. There is no more reason to say that residents of rural areas are entitled to over-representation to protect their interest than there is to say that negroes, Jews, Catholics, foreign born, union members, industrialists, or any other group should be entitled to such over-representation. In fact, if one were going to allow a minority group to be over-represented to protect their interest there are many other minority groups which need representation far more than the residents of

rural areas. Over-representation for any minority group is out of the question as a justification for denial of equal protection of law to the majority.

Over-representation for the residents of rural areas to preserve checks and balances and to justify a bicameral legislature has no basis unless it be assumed that rural legislators will serve as a better reviewing body than would any other group of legislators. Of course, in the constitutional structure of the state to provide for checks and balances there are the three branches – the executive, legislative and judicial. To the extent that two houses of the legislature are desirable to serve as a check on each other, that can be accomplished just as well by having legislators of one house have constituents from a larger area consisting of more different kinds of constituents than those of the other. This would be the result if both the Ohio House and Senate were made proportional to population.

Indeed all of the reasons given in the opinion below are amply refuted by the fact that for over a hundred years both branches of the Ohio legislature were apportioned according to population and functioned quite adequately in respect to all of those particulars.

The principles of equality of representation set forth in the Ordinance of 1787 and the Constitution of 1802 are just as reliable and fair today as they were then. Indeed as time has gone on all obstacles of to equal representation in the elective franchise based on any other requirements than *people* have been removed one by one. The bar of color has been removed. The bar of sex is gone. Property requirements, tax payments requirements and other restrictions are all disappearing. Even the removal of the election of United States Senators from the people has been eliminated by the Seventeenth Amendment. To attempt to errect an artificial, fictitious entity such as a county as a basis for representation, to destroy and interfere with apportionment

according to people would be a long step backwards with no justification in history, philosophy, logic or law to support it.

The Hanna Amendment Is Not Saved Because It Is Part of The Ohio Constitution

The trial court says that the Hanna Amendment was adopted, not by the legislature, but by the people as part of their constitution by an overwhelming majority. The reason for the size of the majority has already been pointed out, but the size of the majority or any majority is irrelevant. Indeed earlier in its opinion the trial court indicates that any state constitutional provision contrary to the federal constitution would have to fall by reason of the supremacy clause. It is clear that the Hanna Amendment gets no protection by being part of the Ohio Constitution if it violates the Fourteenth Amendment to the United States Constitution.

A Theoretical Political Remedy Cannot Deprive Appellants of Equal Protection of Law

The court below stated that the people of Ohio can amend their constitution by repealing the Hanna Amendment if they wish. The Ohio Constitution can be amended by vote of the people (a) if the amendment is placed on the ballot by a joint resolution of three-fifths of both houses of the legislature, (b) if a proposal is submitted by a constitutional convention called by a joint resolution of two-thirds of both houses of the legislature, (c) if a proposal is submitted by a constitutional convention which each twenty years the people can call by popular vote, or (d) if a proposal is placed on the ballot through the initiative.

Obviously any repeal of the Hanna Amendment through any means which requires a three-fifths vote or a two-

thirds vote of the House of Representatives is futile with the absolute control of that house by the rural legislators as shown above. Whether or not a constitutional convention will be called by a vote of the people at the end of any twenty year period is subject to to many other considerations by the electors besides possible repeal of the Hanna Amendment to make it a practical remedy. Since 1912 the people of Ohio have uniformly rejected calling a constitutional convention on various grounds. Conservatives are fearful that the radicals will get control of the convention. Various other groups are fearful that certain provisions of the Constitution which they like might be jeopardized by the convention. Moreover, even if a convention were called this would not help those who wish to get the Hanna Amendment repealed because the rural dominated legislature has the right under the Ohio Constitution to fix representation in the Constitutional Concention and it can be safely concluded that representation would be fixed in such a manner that no repeal of the Hanna Amendment would be proposed.

That the legislature will defeat every effort to repeal the Hanna Amendment is seen from the fact that in the last thirty years twelve joint resolutions have been introduced in the Ohio State Legislature attempting to affect a repeal of the Hanna Amendment and all have died in committee.

The only other means of getting a proposal to repeal the Hanna Amendment on the ballot would be by the initiative. There the provisions of the Ohio Constitution require signatures on initiative petitions from five percent of the voters in at least half of the counties in the state. This would make any initiative effort vain since forty-eight, or more than half of the counties in Ohio are beneficiaries of the Hanna Amendment, making it obviously impossible to obtain the requisite signatures in the required number of counties. This has been demonstrated by the

fact that in recent years there have been three efforts by the intiative to repeal the Hanna Amendment and all have failed to get on the ballot for want of sufficient signatures.

Likewise the cost of attempting to get a proposal on the ballot by the initiative is prohibitive to any individual citizen as the most recent initative efforts have cost the proponents $144,000 and $135,000 respectively just to get the proposal on the ballot, not to speak of the several million dollars spent in the election campaign.

It is thus seen that there is no practical political remedy open to appellants.

However, what is more fundamental, even if it were practically possible to get a proposal to repeal the Hanna Amendment on the ballot, this could not deprive appellants of their right to have equal protection of the laws enforced in the federal courts. Plainly equal protection of the laws cannot be made to depend upon a popular vote.

Other lower federal courts which have passed on the question as to whether the initiative is an adequate remedy have decided that it is not. *The League of Nebraska Municipalities* v. *Marsh*, 209 F. Supp. 189 (Neb. 1962), *Moss* v. *Burkhardt*, (Okla. 1962) 207 F. Supp. 685, *Thigpen* v. *Meyers* (Wash. 1962) 211 F. Supp. 826, now pending on appeal in this court. As stated in *Moss* v. *Burkhardt*:

> "We of course have in mind the pending initiative petition as a possible available remedy, but the right asserted here cannot be made to depend upon the will of the majority."

Similarly in *Thigpen* v. *Meyers*:

> "The inalienable constitutional right of equal protection cannot be made to depend upon the will of the majority."

Thus even if somehow a proposal to repeal the Hanna Amendment were put on the ballot and lost for any reason, this could still not deprive appellants of their right to equal

protection of the laws. If ninety-five percent of the electors of Ohio placed in the Ohio Constitution a provision which denied the equal protection of laws to any citizen, the fact that such deprivation had the protection cloak of the State Constitution and was adopted by an overwhelming majority of the people would not prevent its being stricken down as in violation of the Fourteenth Amendment.

The justiciability of the claim of denial of equal protection in the face of the existence of the initiative was necessarily inherent in this court's reversal and remand of *Scholle* v. *Hare*, (360 Mich. 1), in 369 U.S. 429, 8 L.ed 2d 1, 82 S. Ct. 910 (1962) because it was an initiated Michigan constitutional amendment of 1952 which the plaintiffs there claimed denied them equal protection of the laws and neither that fact nor the availability of the initiative process to correct the abuse of the 1952 amendment was sufficient to oust the court of jurisdiction.

In view of the conflict between the opinion below and the cases just cited on the effect of the theoretical availability of a political remedy on the right to judicial intervention against a state's denial of equal protection of the laws, there can be little doubt as to the substantiality of the question and the necessity for a definitive decision of this court on it.

There Is No Reasonable Justification for Guaranteeing Each County One Representative Regardless of Population

Granting that "numerical equality" is perhaps not the sole test of constitutionality in apportionment, that other factors may be considered, and that "there is room for weighting" as stated in Mr. Justice Douglas' concurring opinion in *Baker* v. *Carr*, nevertheless population cannot be ignored entirely as in the Hanna Amendment. Even

with the Hanna Amendment invalidated, because of the one-half ratio provision, there would still be more than adequate "weighting" in favor of the residents of the less populous counties to accommodate any conceivable justification for any weighting, although to be sure no such justification has been shown. However, the present ratios of weighting as wrought by the Hanna Amendment of four to one, six to one, eight to one, ten to one, thirteen to one, fourteen and one-half to one, and all ratios in between, vertically as to some, horizontally as to others, obviously cannot be considered as mere weighting, and objection thereto is surely not a demand for perfect numerical equality.

Mr. Justice Douglas made it plain what he meant when he used the words "room for weighting"; that there were rather close limits beyond which one could not be permitted to go. In his dissenting opinion in *McDougall* v. *Green*, 335 U.S. 281, 93 L. Ed. 3, 69 S. Ct. 1, he ruled that "giving some citizens twice the votes of other citizens" was unconstitutional. In *Colgrove* v. *Green*, 328 U.S. 549, 90 L. ed. 1432, 66 S. Ct. 1198, in joining in Mr. Justice Black's dissent, he likewise held that the constitution prohibits a law that "gives certain citizens a one-half vote and others a full vote."

Far lesser degrees of malapportionment than exist here were invalidated in *Thigpen* v. *Meyers*, *supra*; *Scholle* v. *Hare*, 376 Mich. 176, 116 NW2d 350 (1962); *Sweeney* v. *Notte*, 183 A2d 296 (R.I. 1962); *Moss* v. *Burkhardt*, *supra*, and *Baker* v. *Carr* (on remand), 206 F. Supp. 341 (Tenn. 1962).

Alleged rationality to be sustained must be evident in present operation, and effect, and not in mere original alleged intent and purpose. Even if it be assumed that a general purpose to give weighted political power to rural areas or county units by giving every county at least one

representative, is rational, nevertheless if the instrument of that supposed rational policy causes irrational results and capricious undue favoritism for one group and invidious discrimination against another group, its otherwise rational policy becomes infected with utter irrationality in result. When in *Baker* v. *Carr* Mr. Justice Clark said "there must be some rational design in the State's districting" and Mr. Justice Stewart said that Tennessee's "system of apportionment is utterly arbitrary" both analyzed the rationality of the operation and effect of the Tennessee law and not of its policy or intent in the abstract.

While it is true that there is an initial presumption of constitutionality of state action, but once a showing has been made of deprivation by a state of rights protected by the federal constitution, the burden shifts to the state to show a "controlling justification" for its action. *NAACP* v. *Alabama*, 357 U.S. 449, 2 L. ed. 2d 1488, 78 S. Ct. 1163, (1958); *Bates* v. *Little Rock*, 361 U.S. 516, 4 L. ed. 2d 480, 80 S. Ct. 412 (1960). The same rule applies in apportionment cases. *Lisco* v. *McNichols*, 208 F. Supp. 471 (Colo. 1962); *Mann* v. *Davis*, 213 F. Supp. 577 (Va. 1962).

Appellants have shown gross discrimination in all proportions between the residents of the various counties. The burden of justifying it has shifted to appellees, but they have failed to show any justification whatever.

To use counties as a "standard" is unreasonable in basis and irrational in effect. There is no justifiable reason to favor counties *qua* counties, they being mere artificial "creatures of the state", with no sovereignty or special interests distinct from *people* in state legislative policy. Regardless of how innocent using counties as a standard might appear without analysis, the grossly invidious dis-

crimination and "rotten borough" system presently resulting from the Hanna Amendment condemns such use as unconstitutional.

The frequency with which an area or artificial subdivisional unit of state government rather than people is used as a basis for state legislative apportionment and the invidious discrimination resulting therefrom as in this case makes the validity of such a basis a very substantial question requiring this court's decision.

Conclusion

As the questions presented by this appeal are substantial and urgently need this court's decision, and particularly because of the conflict between the opinion below and the opinions of other federal and state courts on a number of the questions presented, probable jurisdiction should be noted and this case set down for briefing and oral argument on the merits. Since *Nolan* v. *Rhodes*, also on appeal in this court, involves substantially the same question and was consolidated with this case for hearing below, this court will (if probable jurisdiction is noted) probably consolidate that case and this case for hearing in this court.

Because of differences in facts and Ohio constitutional provisions, the questions presented by these Ohio appeals are not identical with those raised in the other apportionment cases in this court in which probable jurisdiction has already been noted. It would therefore be appropriate to withhold decision in such other cases until after these two Ohio cases are argued on the merits to enable this court to consider at one time the various aspects in all these cases, and thus permit this court to lay down more

comprehensive and definitive guide lines for constitutional requirements of state legislative apportionment.

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APPENDIX A

(CAPTION OMITTED)

OPINION

(Entered June 12, 1963.)

Before: WEICK, Circuit Judge, WEINMAN and PECK, District Judges.

WEICK, Circuit Judge.

These two actions were consolidated for hearing because each one questions the validity of the apportionment of Ohio's House of Representatives and seeks an adjudication that the last sentence in Article XI § 2 of the Constitution of Ohio be declared unconstitutional and void in violation of the Fourteenth Amendment to the Constitution of the United States. This sentence in the Ohio Constitution reads: "Provided, however, that each county shall have one representative." Since the actions involved the constitutionality of state law, the Chief Judge of the Circuit constituted this three-judge court to hear them pursuant to Title 28 U.S.C. §§ 2281 and 2284.

The plaintiff in the *Nolan* case is a resident of Cuyahoga County which contains the largest population in the State. He is a qualified and registered voter in the State and County and a taxpayer. He brings the action in his own behalf and on behalf of all others similarily situated.

The plaintiffs in the *Sive* case are residents, electors and taxpayers of Hamilton County, which is next largest in population and they likewise sue as a class.

The defendants in *Nolan* are the Governor, Auditor and the Secretary of the State of Ohio. Under Article XI § 11 of the Ohio Constitution they are charged with the duty of ascertaining the ratio of representation, according to the

decennial census, of the number of representatives and senators each county or district shall be entitled to elect to the General Assembly within the next ten years. In *Sive* certain election officials are named as additional defendants.

A stipulation of facts was agreed to by the parties and is adopted as findings of fact. Trial briefs were filed. The consolidated cases were argued orally. The arguments were transcribed and briefs on the merits were filed. The entire subject has been treated exhaustively by able counsel.

THE ELEVENTH AMENDMENT DOES NOT BAR THE BRINGING OF THESE ACTION.

At the threshold, we are met with the contention of the defendants that these actions in reality are suits against the State of Ohio which affect its form of government and that the Eleventh Amendment to the Constitution of the United States does not extend the judicial power to a suit against a state. They cite: *Ford Motor Co.* v. *Department of Treasury, State of Indiana,* 323 U.S. 459; *Hans* v. *Louisiana,* 134 U.S. 1; *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682.

The present actions, however, were brought under the Civil Rights Act (28 U.S.C. § 1343) against the individual officers of the State to enjoin the commission by them of acts alleged to be in violation of the Constitution of the United States. *Baker* v. *Carr,* 369 U.S. 186 is implicit that the actions are maintainable. See also: *Peterson* v. *City of Greenville,* 373 U.S. — (1963); *Georgia R. R. and Banking Co.* v. *Redwine,* 342 U.S. 299. It makes no difference whether a state constitution rather than a statute is involved. *Standard Computing Scale Co.* v. *Farrel,* 249 U.S. 571.

OHIO'S LEGISLATIVE SYSTEM

Ohio has a bicameral legislature following the federal pattern and consisting of a Senate and House of Representatives. The 105th General Assembly has 137 members of the House elected biennially by the electors of the respective counties for terms of two years. The Senate consists of 33 Senators elected by the electors of the respective senatorial districts on a staggered basis for terms of four years.

There are 88 counties in the State and 35 Senatorial Districts. The State has a population of 9,706,397 according to the census taken in 1960.

Apportionment of the General Assembly is provided for by Article XI of the Ohio Constitution. In substance, the Senate is apportioned by population and the House by area and population. The entire population of the state is divided by the number of 100 to determine the ratio of representation in the House for the next ten years. Every county having a population equal to one-half of such ratio shall be entitled to one representative. Counties having a population in excess of one ratio are entitled to a proportional number of representatives. Prior to November 3, 1903 if a county entitled to separate representation had a decrease in population below the one-half ratio, it had representation by being attached to the adjoining county having the least number of inhabitants. Because of the Amendment of November 3, 1903 each county was guaranteed one representative.

The Constitution does not limit the number of representatives a county may gain by increase of its population in relation to the state's total population. Article XI § 3.

The apportionment of the Ohio Senate is based as nearly as practicable upon population.

The enactment of any law in Ohio requires a majority vote of both Senate and House and may be vetoed by the Governor who is elected by the electors of the state. The veto can be overridden by a three-fifth's vote in both houses.

Laws may be initiated by petition and submitted to a vote by the electors of the state. Article II § 1 Ohio Constitution. All laws except those providing for tax levies, appropriations for current expenses and emergency measures are subject to a referendum by the electors of the state. Article II § 1c Ohio Constitution.

The Constitution of Ohio can be amended only by a majority vote of the electors of the state voting on the proposal to amend. Article XVI §§ 1 & 3, Article II § 1b Ohio Constitution. Proposals to amend may be submitted by initiative petition (Article II § 1a Ohio Constitution) or by joint resolution of the General Assembly. Article XVI § 1 Ohio Constitution.

Each twenty years there is submitted to the electors of the state the question whether a constitutional convention shall be called. Article XVI § 3 Ohio Constitution. The issue was last so submitted in 1952.

It is readily apparent from this review of Ohio's substantially different and perhaps unique governmental machinery that the factual situation here existing differs from that which has been before other courts considering apportionment problems.

DOES OHIO'S SYSTEM OF APPORTIONMENT OF ITS HOUSE OF REPRESENTATIVES DISCRIMINATE INVIDIOUSLY AGAINST PLAINTIFFS?

Plaintiffs contend that both houses in Ohio must be apportioned in accordance with population and any substantial deviation therefrom in either house results in an invidious discrimination against them in violation of the

Equal Protection Clause of the Federal Constitution. They do not seriously argue that the Amendment was unconstitutional at the time it was adopted in 1903.[1] They contend, rather, that it has since become unconstitutional because of shifts in Ohio's population from rural to urban areas of the state and other changes in conditions.

It should be pointed out that Ohio's apportionment was not adopted by the state legislature, but by the people of the state in their Constitution. The Amendment to the Constitution under attack here was adopted in 1903 by an overwhelming majority of the electors of the state, i.e., 98% for and 2% against and has been in effect for nearly sixty years.

It was conceded that the apportionments made by the Governor, Auditor and Secretary of the State each ten years since the Constitution of 1861 was adopted have been in conformity with the provisions of the Constitution of Ohio. Plaintiffs' only complaint is that Ohio's Constitution guarantees to each county one representative in the House and that that constitutes invidious discrimination against them.

No question has been raised in these cases concerning the apportionment of Ohio's Senate, which is by population of the senatorial districts. Defendants assert that the urban centers have overwhelming control of the state Senate. They have computed figures from the stipulated facts (Exhibit P) which indicate that the electors of the senatorial districts in which the seventeen most populous counties of the state are included are represented in the 105th General Assembly by 26 senators or 78.7% of the 33 members of the senate. These 17 counties, they say, contain 68.6% of the total population of the state. Defendants further claim that in the 105th General Assembly the electors of the senatorial districts in which the eight most populous

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[1] Counsel for Nolan admitted in argument that the Amendment was valid when passed.

counties are included are represented by 20 senators or 60.6% of the whole senate. These 8 most populous counties contain 54.9% of the state's total population. Plaintiffs in their brief point out that the senatorial districts containing the 17 largest counties contain a total of 45 counties and 79% of the population and that the 8 largest senatorial districts containing 12 counties elect 58% of the Senate and have 57% of the population.

It is clear that the Senate is properly apportioned according to population.

At the time the Ohio Constitution was amended in 1903 to provide for one representative in the House for each county only ten counties were below the ratio of representation and hence were attached to other counties. Forty-eight counties are now below the ratio of representation, but in view of the 1903 proviso can elect 48 out of the 137 members of the House in the 105th General Assembly. Cuyahoga County can elect 17 (one for each 96,935 of population).[2] Vinton County which is the smallest county in the state with a population of 10,274 can elect one representative. Hamilton County can elect 9.

Plaintiffs argue that the vote of an elector in Vinton County for state representative is worth almost 10 times as much as the vote of an elector in Cuyahoga County; that the ratio between Vinton and Lake Counties is almost 15 to 1, and 10 to 1 between Vinton and Summit, Clark, Montgomery, Franklin, Hamilton, Stark, Mahoning, Lucas and Trumbull Counties. Similarly, disparities in ratio exist with respect to other small counties.

This same argument could be made with equal force by the largest states in the Union, such as New York, California, Pennsylvania and Illinois, with respect to the representation allowed the smaller states in Congress by the

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[2] The ratio of representation in 1960 was 97,064. One-half ratio was 48,532.

federal constitution. Vermont, Nevada, Wyoming and Alaska each have two senators as do the large states. The smaller states are also allowed at least one representative in the House of Representatives. Compared with the Ohio House, the difference is only in the degree. The Ohio Senate is apportioned according to population. The United States Senate is not. We realize that the federal example is not entirely apposite, but both federal and Ohio governments have Constitutions with Bills of Rights. Counties are units of state government. What is rational for the federal government ought not be condemned as irrational and invidious for Ohio. *Committee* v. *Tawes,* 184 Atl. 2d 715.

As shown by the following table compiled from Exhibit O to the stipulation, twenty urban counties have not been overlooked in their representation in the House of Representatives.

COUNTY	POPULATION	PRINCIPAL CITY	NO. REPS.
(1) Cuyahoga	1,647,895	Cleveland and suburbs	17
(2) Hamilton	864,121	Cincinnati	9
(3) Franklin	682,962	Columbus	7
(4) Montgomery	527,080	Dayton	5
(5) Summit	513,569	Akron	5
(6) Lucas	456,931	Toledo	5
(7) Mahoning	300,480	Youngstown	3
(8) Stark	340,345	Canton & Massillon	3
(9) Trumbull	208,526	Warren	2
(10) Butler	199,076	Hamilton & Middletown	2
(11) Lorain	217,500	Lorain & Elyria	2
(12) Clark	131,440	Springfield	1
(13) Allen	103,691	Lima	1
(14) Richland	117,761	Mansfield	1
(15) Jefferson	99,201	Steubenville	1
(16) Licking	90,242	Newark	1
(17) Marion	60,221	Marion	1
(18) Scioto	84,216	Portsmouth	1
(19) Erie	68,000	Sandusky	1
(20) Muskingum	79,159	Zanesville	1
Total Representatives from Twenty Counties			69
Total Membership of House in 105th General Assembly			137

There does not seem to be much reason for a bicameral legislature if both houses are required to be apportioned on the same basis.

Whenever the people of Ohio desire to change their Constitution the way is wide open for them to do it. If the Legislature does not make the proposal, the people can do it by initiative petition. In addition, the people automatically have the opportunity each twenty years to vote for a constitutional convention. Ohio had a consti-

tutional convention after the 1903 Amendment was passed, namely, in 1912, which took no action to change the apportionment of the General Assembly. In this convention "Home Rule" for municipalities, initiative and referendum, workman's compensation and other liberal measures were adopted. In 1932 and again in 1952 the state electorate voted against calling a constitutional convention. Not one county in the state voted in favor of calling it in 1952. This would indicate rather clearly that the people in the counties in which plaintiffs reside did not then want any tampering with their Constitution.

Since 1913, 31 proposals to amend the Constitution of Ohio have been submitted to the electorate by initiative petition. 9 were adopted and 22 were rejected. During this period 53 such proposals were submitted to the voters by joint resolutions of the General Assembly. 32 were adopted and 21 rejected.

Despite the foregoing impressive record, plaintiffs complain about the practical difficulties in inducing Ohio's Legislature to submit proposals to amend the Constitution for a vote of the people or in securing signatures on initiative petitions. The fact is that in almost every state election there are proposals on the ballot to amend Ohio's Constitution. The contention also overlooks the right of the people to vote for a constitutional convention every twenty years. We submit it ought not to be easy to amend or change the basic law of the state or nation. If the rule were otherwise, Ohio would be flooded with crackpot schemes some of which today are being urged in respect to amending the Constitution of the United States.

Ohio's constitutional apportionment takes into account the varying interests of its citizens engaged in different occupations in the 88 counties of the state. It reflects a determination of the people to give representation to each of the counties even though some of them are thinly popu-

lated. It seeks to protect the masses by giving them control of the Senate. The system is one of checks and balances designed to protect minority as well as majority interests, but with neither in control. Such an apportionment, in our judgment, cannot be said to be irrational.

Ohio's apportionment formula is not unusual, but is one of the most common methods appearing in state constitutions that recognize both population and area. About one-half of the states in the Union have legislative bodies so apportioned.[3] Can it be said that they are all irrational?

Ohio had wide discretion in making a classification and even though it may result in some unequality and discrimination it "will not be set aside if any state of facts may reasonably be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426.

In *MacDougall* v. *Green*, 335 U.S. 281 the Court said:

> "It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution – a practical instrument of government – makes no such demands on the States."

In *Williamson* v. *Lee Optical Co.*, 348 U.S. 489 the Court said: "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination."

The burden of proof of unconstitutionality is upon the plaintiffs. *Metropolitan Casualty Co.* v. *Brownell*, 294 U.S. 580, 584.

In our judgment, Ohio's Constitution does not discrim-

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[3] A Commission Report - Apportionment of State Legislatures - Advisory Commission on Intergovernmental Relations, December 1962 p. 39.

inate invidiously against the plaintiffs nor does it deprive them of the equal protection of the laws. It was not irrational to allow one representative for each county. *WMCA v. Simons*, 208 F. Supp. 368 (S.D., N.Y.); *Sobel* v. *Adams*, 208 F. Supp. 316, 323 (S.D., Fla.). Ohio's Constitution does not discriminate against anyone on account of race, religion or previous condition of servitude.

We do not understand that plaintiffs want more seats in the House than 17 for Cuyahoga County and 9 for Hamilton County which they now have. What they seek is to take away the smaller counties their right to one representative for each county and attach these counties to others. This would result in a reduction of house membership from 138 to 111. The votes of Cuyahoga County's 17 representatives and Hamilton County's 9 would then bear a higher proportion to the total vote in the House than they now do. It would dilute the strength of the minority and increase the strength of the majority vesting in the latter absolute control of both houses. In our opinion, the majority is entitled to protection the same as the minority, but this does not mean that they should dominate and control both houses in the state legislature.

Plaintiffs remedy is at the polls and not in the courts.

This opinion is adopted as findings of fact and conclusions of law.

Judgment may be entered in both cases in favor of defendants and dismissing the complaints.

Dated Columbus, Ohio
June 12, 1963.

PAUL C. WEICK
United States Circuit Judge

CARL A. WEINMAN
United States District Judge

JOHN W. PECK
United States District Judge

APPENDIX B

Title 28, U.S.C. Section 1253

Direct Appeals from Decisions of Three-Judge Courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges. June 25, 1948, c. 646, 62 Stat. 926.

APPENDIX C

EXCERPTS FROM THE CONSTITUTION OF OHIO

ARTICLE XI: APPORTIONMENT

1. The apportionment of this state for members of the general assembly shall be made every ten years, after the year one thousand eight hundred and fifty-one, in the following manner: The whole population of the state, as ascertained by the federal census, or in such other mode as the general assembly may direct, shall be divided by the number "one hundred," and the quotient shall be the ratio of representation in the house of representatives, for ten years next succeeding such apportionment.

2. Every county having a population equal to one-half of said ratio, shall be entitled to one representative; every county, containing said ratio, and three-fourths over, shall be entitled to two representatives; every county containing three times said ratio, shall be entitled to three representatives; and so on, requiring after the first two, an entire ratio for each additional representative, *provided, however, that each county shall have one representative.* (Italics added)

3. When any county shall have a fraction above the ratio, so large, that being multiplied by five, the result will be equal to one or more ratios, additional representatives shall be apportioned for such ratios, among the several sessions of the decennial period, in the following manner: If there be only one ratio, a representative shall be allotted to the fifth session of the decennial period; if there are two ratios, a representative shall be allotted to the fourth and third sessions, respectively; if three, to the third,

second, and first sessions, respectively; if four, to the fourth, third, second, and first sessions, respectively.

4. Any county, forming with another county or counties, a representative district, during one decennial period, if it have acquired sufficient population at the next decennial period, shall be entitled to a separate representation, if there shall be left, in the district from which it shall have been separated, a population sufficient for a representative; but no such change shall be made, except at the regular decennial period for the apportionment of representatives.

5. If, in fixing any subsequent ratio, a county, previously entitled to a separate representation, shall have less than the number required by the new ratio for a representative, such county shall be attached to the county adjoining it, having the least number of inhabitants; and the representation of the district, so formed, shall be determined as herein provided.

6. The ratio for a senator shall forever, hereafter, be ascertained by dividing the whole population of the state by the number thirty-five.

6a. When any Senatorial district shall have a fraction above the ratio, so large, that being multiplied by five, the result will be equal to one or more ratios, additional Senators shall be elected for two year terms and shall be apportioned for such ratios, among the several sessions of the decennial period, in the following manner: if there be only one ratio a Senator shall be allotted to the fifth session of the decennial period; if there are two ratios, a Senator shall be allotted to the fourth and third sessions, respectively; if three, to the third, second, and first sessions, respectively; if four to the fourth, third, second, and first sessions, respectively provided that no additional senator mentioned herein shall be elected if his election

would result in his senatorial district having as members of the next following general assembly a number of senators in excess of its number of full ratios plus one.

7. The state is hereby divided into thirty-three senatorial districts, as follows: The county of Hamilton shall constitute the first senatorial district; the counties of Butler and Warren, the second; Montgomery and Preble, the third; Clermont and Brown, the fourth; Greene, Clinton, and Fayette, the fifth; Ross and Highland, the sixth; Adams, Pike, Scioto, and Jackson, the seventh; Lawrence, Gallia, Meigs, and Vinton, the eighth; Athens, Hocking, and Fairfield, the ninth; Franklin and Pickaway, the tenth; Clark, Champaign, and Madison, the eleventh; Miami, Darke, and Shelby, the twelfth; Logan, Union, Marion and Hardin, the thirteenth; Washington and Morgan, the fourteenth; Muskingum and Perry, the fifteenth; Delaware and Licking, the sixteenth; Knox and Morrow, the seventeenth; Coshocton and Tuscarawas, the eighteenth; Guernsey and Monroe, the nineteenth; Belmont and Harrison, the twentieth; Carroll and Stark, the twenty-first; Jefferson and Columbiana, the twenty-second; Trumbull and Mahoning, the twenty-third; Ashtabula, Lake, and Geauga, the twenty-fourth; Cuyahoga, the twenty-fifth; Portage and Summit, the twenty-sixth; Medina and Lorain, the twenty-seventh; Wayne and Holmes, the twenty-eighth; Ashland and Richland, the twenty-ninth; Huron, Erie, Sandusky and Ottawa, the thirtieth; Seneca, Crawford and Wyandot, the thirty-first; Mercer, Auglaize, Allen, Van Wert, Paulding, Defiance, and Williams, the thirty-second; and Hancock, Wood, Lucas, Fulton, Henry and Putnam, the thirty-third: For the first decennial period, after the adoption of this constitution, each of said districts shall be entitled to one senator, except the first district, which shall be entitled to three senators.

8. The same rules shall be applied, in apportioning the fractions of senatorial districts, and in annexing districts, which may hereafter have less than three-fourths of a senatorial ratio, as are applied to representative districts.

9. Any county forming part of a senatorial district, having acquired a population equal to a full senatorial ratio, shall be made a separate senatorial district, at any regular decennial apportionment, if a full senatorial ratio shall be left in the district from which it shall be taken.

10. For the first ten years, after the year one thousand eight hundred and fifty-one, the apportionment of representatives shall be as provided in the schedule, and no change shall ever be made in the principles of representation, as herein established, or, in the senatorial districts, except as above provided. All territory, belonging to a county at the time of any apportionment, shall, as to the right of representation and suffrage, remain an integral part thereof, during the decennial period.

11. The governor, auditor, and secretary of state, or any two of them, shall, at least six months prior to the October election, in the year one thousand eight hundred and sixty-one, and, at each decennial period thereafter, ascertain and determine the ratio*n* of representation, according to the decennial census, the number of representatives and senators each county or district shall be entitled to elect, and for what years within the next ensuing ten years, and the governor shall cause the same to be published, in such manner as shall be directed by law.